MINNESOTA HOUSING

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DATE: February 20, 2020

TO: Minnesota Housing Board Members

FROM: Jennifer Ho, Commissioner

SUBJECT: **FINANCE AND AUDIT COMMITTEE MEETING**

A meeting of the **Finance and Audit Committee** has been scheduled for **11:30 a.m.** on **Thursday, February 27** at the offices of Minnesota Housing, 400 Wabasha Street, Suite 400, St Paul, MN 55102 in the **Lake Superior Conference Room on the fourth floor**.

The topics for discussion at this meeting are:

A. 2019 Agency Risk Profile
B. 2019 Annual Conflict of Interest Disclosure Reporting
C. Ethics and Conflicts of Interest Review
D. Semi-annual Chief Risk Officer Report (provides status update re fraud, misuse of funds, and conflict of interest investigations for period 7/15/19 –12/31/29)
E. Other Business (if any)
F. Adjournment

This committee is a committee of the whole and all members are encouraged to attend.

If you have questions, please call Rachel Franco at (651) 296-2172.

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**Committee Agenda Item:** A.
**Date: 2/27/2020**

**Item:** Agenda Risk Profile

**Staff Contact(s):**
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**Request Type:**

☐ Approval
- ☐ Motion
- ☐ Resolution

☐ No Action Needed
- ☒ Discussion
- ☐ Information

**Summary of Request:**
The Agency faces a number of risks to achieving its objectives. The Agency Risk Profile is a component of the Enterprise Risk Management (ERM) Framework and is produced annually to communicate critical risk information to the board.

**Fiscal Impact:**
None

**Meeting Agency Priorities:**
- ☐ Improve the Housing System
- ☐ Preserve and Create Housing Opportunities
- ☐ Make Homeownership More Accessible
- ☐ Support People Needing Services
- ☐ Strengthen Communities

**Attachment(s):**
- 2019 Agency Risk Profile report

**Evaluating** Affordable Housing Efforts

# Agency Risk Profile

## *2019*

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# Table of Contents

# Introduction

A risk profile is a periodic identification, analysis and documentation of critical risk sources to an organization; risks that could impact the organization's ability to achieve its stated objectives over a future time period. For this exercise, critical risk is defined as the chance of something happening that would have a clear and direct negative impact on the achievement of Agency objectives.

Specifically, this Agency Risk Profile is intended to focus on the critical risks confronting the Agency which could negatively impact the Agency's ability to achieve the goals identified in the Minnesota Housing 2020-2022 Strategic Plan and 2020-2021 Affordable Housing Plan. The 11 critical risks assessed this year are unchanged from the three previous assessment periods.

The primary purpose of the Agency Risk Profile is to assist the Commissioner and Risk Management Committee in communicating risk-related issues to the Board of Directors (the Board).

This risk profile is an internal self-assessment. It was developed with input from nine members of the Agency's Risk Management Committee. Late summer 2019, committee members were asked to complete individualized components of an online Agency Risk Profile which contained the previously identified 11 sources of critical risk to the Agency. For these risk sources, committee members were asked to assess and provide:

- The impact to the Agency should these risks occur;
- The likelihood of these risks occurring;
- The strength of internal controls and other risk mitigation activities in place to prevent or lessen the impact and/or likelihood of the identified risks;
- Additional comments regarding the identified risks.

Using risk impact, likelihood, and assurance (terms defined in Appendix A, at the back of this report) two different risk index scores were calculated – Inherent Index and Residual Index. These two index scores serve as the basis for ranking each of the eleven critical risk sources, from highest to lowest, as determined by where the respective index scores fall in the following tables:

- Inherent Index: Inherent Risk Score Table in Appendix B, Section A
- Residual Index: Residual Risk Score Table in Appendix B, Section C

Additional information regarding "Inherent Risk" and "Residual Risk," including the two risk-related indices, is also provided on pages three and four.

NOTE: The most recent Agency Risk Profiles were prepared in 2015, 2016, and 2017. No risk profile was completed during 2018 but was prioritized for 2019 once new leadership was in place and had sufficient time to settle in to new roles.

# Executive Summary

This Risk Assessment report reflects the ratings and comments of management at Minnesota Housing. In creating this document, management considered the controllable and non-controllable factors that impact our work as a Housing Finance Agency. The general management philosophy of Minnesota Housing is that some level of risk is necessary in order to achieve our mission, and with solid controls and continuous improvement, risk can be effectively monitored and managed.

Assessed risk within the Agency has decreased since the last Agency Risk Profile was completed in 2017. Eleven critical risk sources were assessed and none received a “Very High” or “High” risk ranking based upon the Inherent Index scores; and only one risk source received a “High” risk rank based upon its Residual Index score. Improvements in national and Minnesota housing markets, a continued low-interest rate environment, and increased Agency funding allocations received during the 2019 Legislative Session are a few of the key drivers that moved risk scores lower. However, the need for affordable housing is more pronounced and more publicized than when the last risk profile was completed. This situation requires the Agency’s continued evolution to better position itself to be able to meet the increasing needs for more affordable housing for low- and moderate-income Minnesotans.

To address these needs, the newly transitioned Servant Leadership Team has adopted a motto of “Going Big so Everyone Can Go Home.” To meet this aggressive goal, new strategic priorities and initiatives have been established and identified in the 2020-2022 Strategic Plan and the 2020-2021 Affordable Housing Plan. The Agency’s work environment consists of complex housing and finance markets, numerous legal and regulatory rules, and involves many counterparties. These challenges were considered during the development of this Risk Profile, as were changes to Agency programs, compliance requirements, financing strategies, and supporting technology. Management is well aware of the risks that could negatively impact achievement of the mission and objectives outlined in Strategic and Affordable Housing Plan documents, and therefore manages those risks accordingly through the use of efficient and effective internal controls and other mitigation strategies.

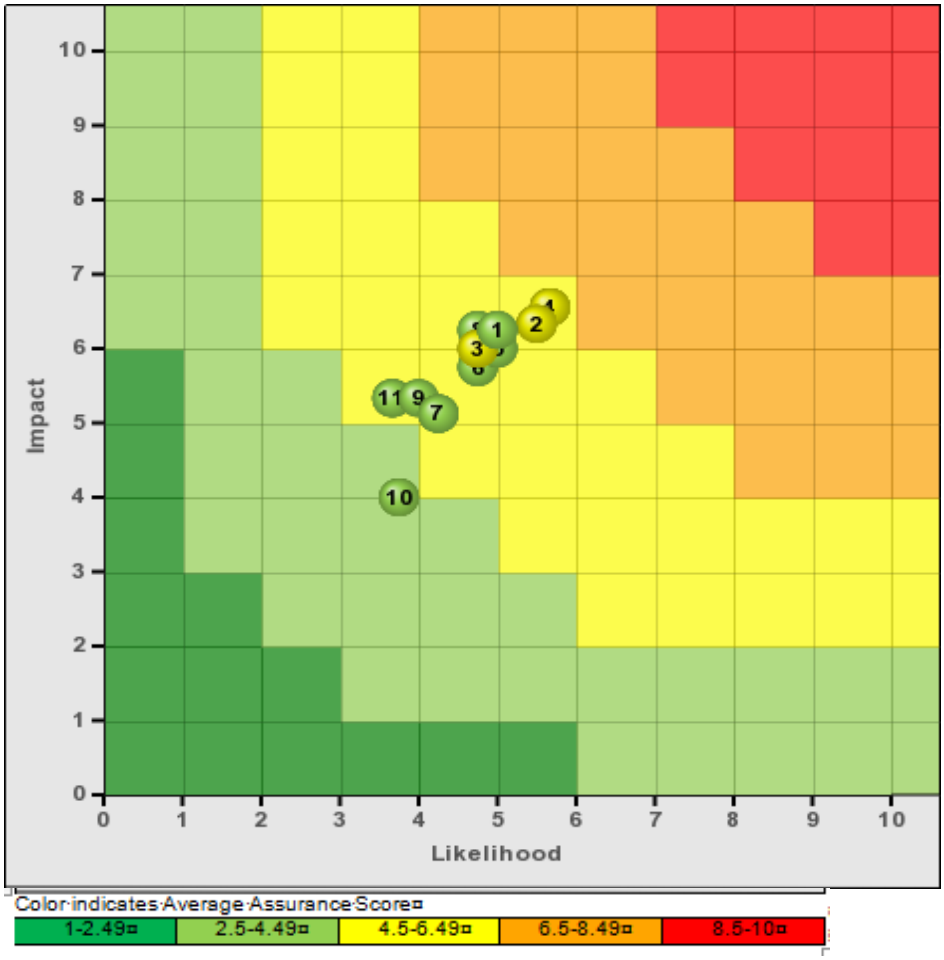
## 2019 Aggregate Results – Inherent Risk Heat Map

Inherent Risk is the risk that an activity would pose if no controls or other mitigating factors were in place. The Inherent Index is designed to measure the level of assessed inherent risk. The Inherent Index score for each critical risk source is calculated by multiplying the assessed impact by the assessed likelihood. The aggregate results of the eleven critical risk source assessments for the current year have been plotted on the Inherent Risk Heat Map below.

Heat maps are a graphical representation of data where the individual values calculated, inherent index scores in this instance, are plotted on a color-coded table with the colors in the table representing different levels of risk. The heat map is intended to visually convey which risk sources pose the greatest challenges to the achievement of Agency objectives. Generally, assessed sources of risk that are plotted in the upper right quadrant of the map have a greater impact and a higher likelihood of occurrence. The color of the plotted data point for each risk source indicates the level of assurance that management has in existing controls and mitigation strategies. See Appendix B at the back of this report for the Inherent Risk Score Table (Section A), and the Assessed Assurance scoring chart (Section B).

There are no critical risk sources that score in the “Very High” or “High” ranges. This is an improvement from the two previous assessments when there were six risks scoring as “High.” Details about the inherent risk levels of each of the eleven risk sources are provided in the Risk Source Narratives section.

| | |
|---|---|
| 1 | Interest Rates |
| 2 | Counterparties |
| 3 | Information Technology |
| 4 | Operational Capacity |
| 5 | Bond Markets |
| 6 | Federal Resources |
| 7 | Compliance |
| 8 | State Appropriations |
| 9 | Business Continuity |
| 10 | Loan Performance |
| 11 | Planning and Execution |



# 2019 Aggregate Results – Residual Risk Profile Matrix

Residual Risk is the risk that remains AFTER controls and mitigation activities are taken into account. The Residual Index is designed to measure the level of assessed residual risk. The Residual Index score for each critical risk source is calculated by multiplying the assessed impact by assessed likelihood, and multiplied again by the assurance score. All individual Residual Index scores are averaged to produce a Residual Index score for each Risk Source.

The Residual Index scores for the 2019 assessment have been incorporated into the Residual Risk Profile Matrix below to delineate the level of risk between each of the 11 critical risk sources over the last four Agency Risk Profile reports.

The Residual Risk Profile Matrix is arranged in a "Top Eleven" format, from highest to lowest risk level, as determined by the Residual Index score. Within the Matrix, the colors assigned to the individual Residual Index boxes correspond to the Residual Risk Score Table at Appendix B, Section C, located at the back of this report.

Counterparties is the only critical risk source to score "High" (coded in orange). This is an improvement from the previous two assessment periods when there were six risk sources scoring in the "High" range. Details about the residual risk levels of each of the eleven risk sources is provided in the Risk Source Narratives section.

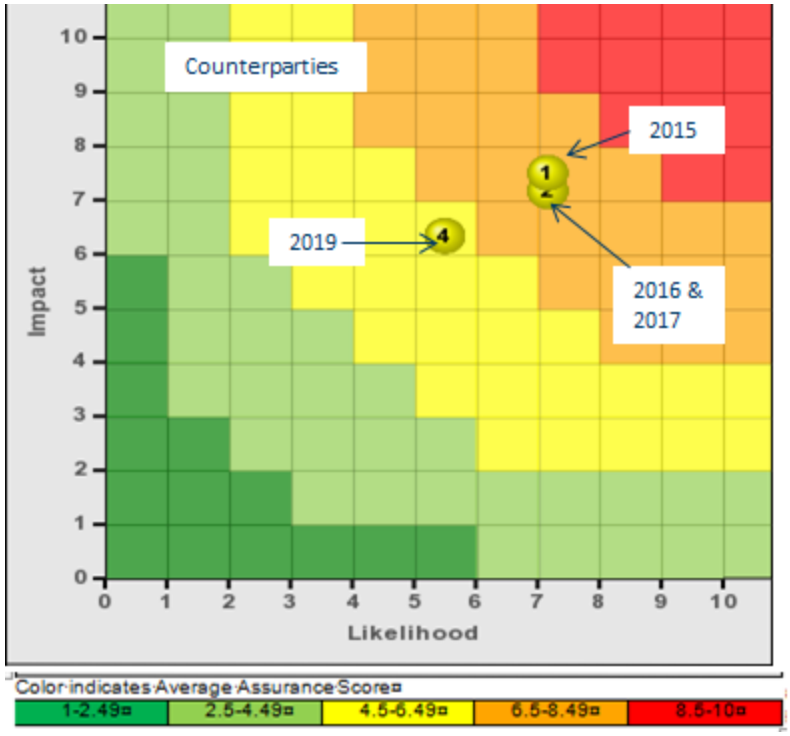
| | | *From 2017 to 2019 | 2019 Risk Level | | *2017 Risk Level | | 2016 Risk Level | | 2015 Risk Level | |
|---|---|---|---|---|---|---|---|---|---|---|
| Risk ID # | Risk Source | Change in Risk? | Risk Rank | Residual Index | Risk Rank | Residual Index | Risk Rank | Residual Index | Risk Rank | Residual Index |
| 2 | Counterparties | Decreased | 1 | 238 | 1 | 314 | 1 | 314 | 2 | 315 |
| 1 | Interest Rates | Decreased | 2 | 198 | 3 | 256 | 3 | 256 | 1 | 332 |
| 4 | Operational Capacity | Increased | 3 | 193 | 7 | 176 | 5 | 206 | 4 | 220 |
| 3 | Information Technology | Decreased | 4 | 148 | 2 | 256 | 2 | 262 | 3 | 311 |
| 5 | Bond Markets | Decreased | 5 | 132 | 5 | 234 | 6 | 191 | 5 | 215 |
| 7 | Compliance | Decreased | 6 | 122 | 8 | 132 | 7 | 151 | 7 | 154 |
| 8 | State Appropriations | Decreased | 7 | 120 | 6 | 240 | 8 | 240 | 8 | 108 |
| 6 | Federal Resources | Decreased | 8 | 101 | 4 | 257 | 4 | 253 | 6 | 192 |
| 9 | Business Continuity | Decreased | 9 | 88 | 9 | 97 | 9 | 113 | 9 | 74 |
| 11 | Planning and Execution | Increased | 10 | 86 | 10 | 55 | 11 | 53 | 11 | 60 |
| 10 | Loan Performance | Decreased | 11 | 44 | 11 | 51 | 10 | 71 | 10 | 72 |

***No Agency Risk Profile was completed in 2018. See NOTE on bottom of Page three for further explanation.**

## Individual Risk Source Narratives

The Risk Source Narratives describe the source of each risk, the objectives impacted and the key mitigating actions that are in place or planned. The risk narratives that follow are ordered 1-11, from highest residual risk score to the lowest residual risk score.

### 1) Counterparties – Moderate Inherent Risk Level / High Residual Risk Level



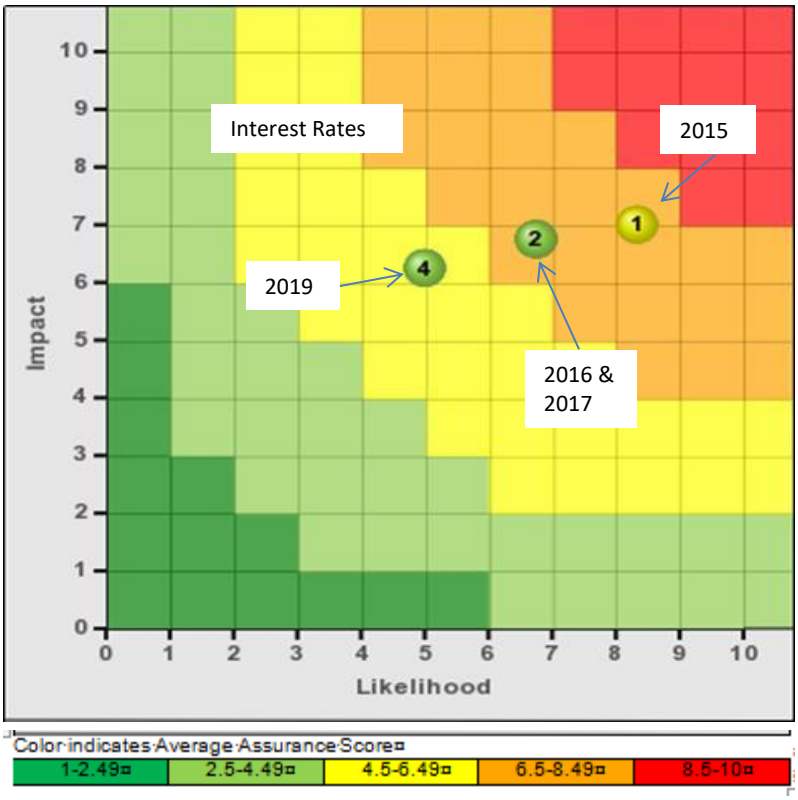

| | Impact | Likelihood | Assurance | Inherent Index | Residual Index |
|---|---|---|---|---|---|
| 2015 | 7.5<br>Serious | 7.17<br>Likely | 5.5<br>Could be improved | 54.5<br>High | 315.33<br>High |
| 2016 | 7.17<br>Serious | 7.17<br>Likely | 5.5<br>Could be improved | 52.83<br>High | 314<br>High |
| 2017 | 7.17<br>Serious | 7.17<br>Likely | 5.5<br>Could be improved | 52.83<br>High | 314<br>High |
| 2019 | 6.33<br>Moderate | 5.5<br>About as likely as not | 4.83<br>Could be improved | 39<br>Moderate | 237.83<br>High |

Counterparties is assessed as the highest risk source for the Agency based upon the residual index score. This determination remains unchanged from the previous two assessments. Counterparties is the only one of the eleven risk sources to score in the high residual index range this year. This is a positive change from 2017 when six risk sources were assessed with high residual index scores. The inherent index score

has dropped to the moderate range (yellow portion of heat map) as a result of decreases in both assessed likelihood and impact. Counterparties are vital to the Agency accomplishing its 2020-2022 Strategic Plan and 2020-2021 Affordable Housing Plan. Counterparties include Government-Sponsored Enterprises (GSEs), including Housing and Urban Development, Fannie Mae and Freddie Mac, other Minnesota state agencies and local units of government, Tribal Governments, credit rating agencies, capital markets participants, lenders, guaranteed investment contract (GIC) providers, brokers, realtors, grantees, sub-grantees, vendors, developers and borrowers. We partner with over 400 organizations/counterparties across the state to administer the programs that we finance. Lack of competition for a Single Family Division master servicing provider creates the risk of disruption to Agency activities. Minnesota Housing also relies on developers, administrators, and grantees to deliver its services. Partner counterparties present risk in terms of their geographic coverage areas in the state, their potential to build and maintain capacity, and financial sustainability of their operations. Counterparties such as federal funding and oversight agencies regularly conduct compliance and audit reviews of Agency activities.

**Effectiveness of Control/Mitigation Activities:**
While individual counterparty relationships present inherent risk and require the need for effective counterparty management, the number and diversity of counterparty relationships at the Agency provide a natural check and balance on the Agency's overall exposure to individual counterparties. The Agency has a Credit Risk team that analyzes and opines on the financial capacity of borrowers, grantees, and other non-federal government counterparties. Also, "know your customer"/counterparty remains a critical aspect of Minnesota Housing's overall risk management strategy. Counterparty risk is addressed on an ongoing basis through strengthening relationships with sole source providers and developing alternative processes when necessary. For instance, Multifamily remodeled the Request For Proposal (RFP) process to include a review of each sponsor's capacity for completing development projects. The Agency is able to comment on the future role and structure of GSEs via the Commissioner's leadership role with the National Council of State Housing Agencies (NCSHA); however, it cannot control the outcome. The Agency continues to work with lenders and other key counterparties to better understand process, program, and technological needs. This effort includes staff providing technical assistance to develop operational capacity for identified loan and grant administrators, and taking appropriate corrective action when counterparties do not follow required operating procedures and Agency guidelines. Minnesota Housing is working with a consultant to analyze the Agency's Single Family Division servicing processes, potential counterparties, and risk management strategies. Attention to managing overall Agency counterparty exposure is evolving but it is already established in standard Agency business practices and protocols.

## 2) Interest Rates – Moderate Inherent and Residual Risk Level




| | Impact | Likelihood | Assurance | Inherent Index | Residual Index |
|---|---|---|---|---|---|
| **2015** | 7<br>Serious | 8.33<br>Likely | 4.67<br>Could be improved | 60<br>High | 332<br>High |
| **2016** | 6.75<br>Serious | 6.75<br>Likely | 4.25<br>Good | 46.75<br>High | 256<br>High |
| **2017** | 6.75<br>Serious | 6.75<br>Likely | 4.25<br>Good | 46.75<br>High | 256<br>High |
| **2019** | 6.25<br>Moderate | 5<br>About as likely as not | 4<br>Good | 33.5<br>Moderate | 198<br>Moderate |

Interest rates is assessed as the 2nd highest risk source for the Agency. The Agency is impacted by interest rates in the market in various ways, with both high and low rates impacting risk in different ways. This risk has been assessed as one of the three highest risks over the four-year review period (see chart on Page 4). However, based upon the significant drop in assessed likelihood, management believes that interest-rate risk is reduced from the 2017 assessment, from both the inherent and residual risk perspectives. Interest rates have been at historic lows for a sustained period. Continued rate compression could lessen demand for Agency lending products, which could impact the Agency revenue. A low-rate environment, like the one we're currently experiencing, also stresses the Agency's

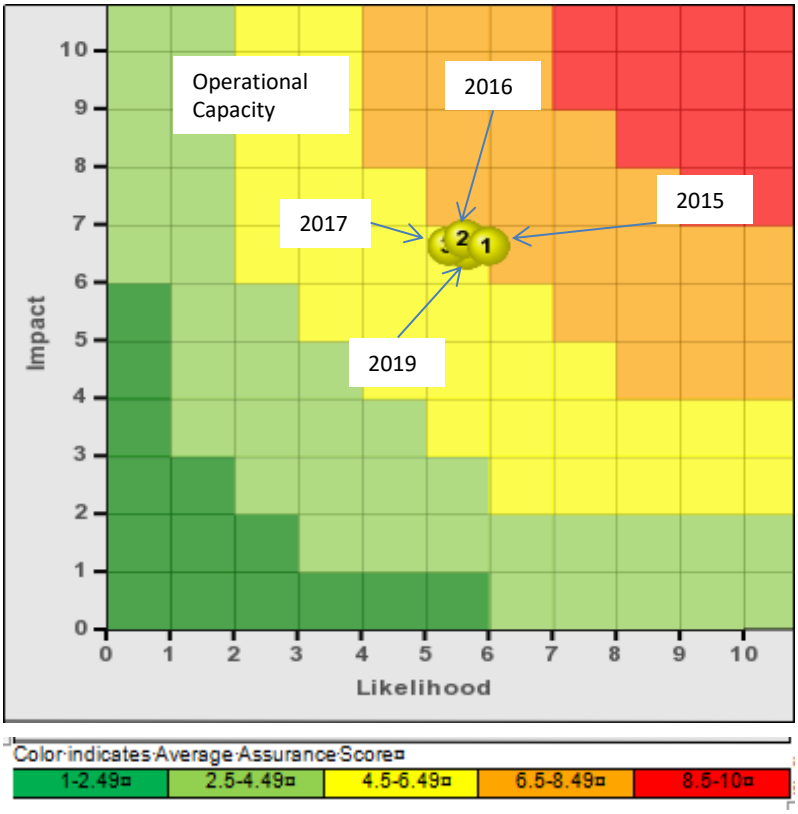
ability to achieve desired earnings resulting in less funds to transfer to Pool 3 and fewer funds to cover the Agency's overhead and operating costs.

Interest rate risk management is a critical activity at Minnesota Housing because the large portfolio of interest-bearing assets serves as the Agency's primary revenue-generation tool. Interest-rate volatility is out of the Agency's control; however, depending on a high or low interest rate environment, the Agency encounters both challenges and opportunities. At any time interest rates may rise or fall in the general economy, and each scenario presents unique challenges to the Agency's business model. For instance, while the current low-rate environment certainly benefits Agency borrowers, it stresses the Agency's earnings. Low rates generally cause high levels of mortgage loan prepayments, challenging the Agency to produce enough new lending to repopulate the balance sheet with assets at acceptable yield levels. Also when rates are low, the Agency loans are generally less competitive with the general market as the rates offered are very similar. This requires the Agency to offer mortgage enhancements such as deferred loans and grants to maintain current levels of loan production to mission-focused borrowers. Rate volatility is also challenging because there is a time differential between when the Agency commits to purchase a loan and when the loan is delivered to, and financed by, the Agency. If interest rates rise dramatically in that time period, the Agency's anticipated profitability is reduced, eliminated, or results in a loss. While interest-rate risk is currently monitored in an effective manner, the increase in packaging loans for sale in the securitization market has increased the volume of loans that is subject to interest-rate movements.

**Effectiveness of Control/Mitigation Activities:**
Interest-rate management requires careful monitoring and oversight to be able to take advantage of short-term opportunities in a low- or high-rate environment while supporting the long-term financial viability of the organization. The Agency employs technically competent and experienced finance staff to manage interest-rate risk. Other aspects of the Agency's interest rate risk management include:

- Maximizing interest rate spread on bonds
- Effective placement of loans in alternative funding vehicles besides the bond markets (e.g. To Be Announced (TBA) sales of single family loans and HUD risk sharing for Multifamily loans)
- Effective loan pipeline management
    - Strategy to have mortgage pipeline 100% hedged at all times
    - The Multifamily Division continues to explore alternative loan structures to increase lending activity (e.g., Low and Moderate Income Rental (LMIR) Bridge loan, LMIR 17-year loan)
    - Continued pursuit of a best-execution policy that weighs the costs of selling fixed-rate or variable-rate tax-exempt mortgage revenue bonds, compared with selling mortgage-backed securities
    - Setting program interest rates in a market-sensitive manner
    - Loan warehousing

### 3) Operational Capacity – Moderate Inherent and Residual Risk Levels



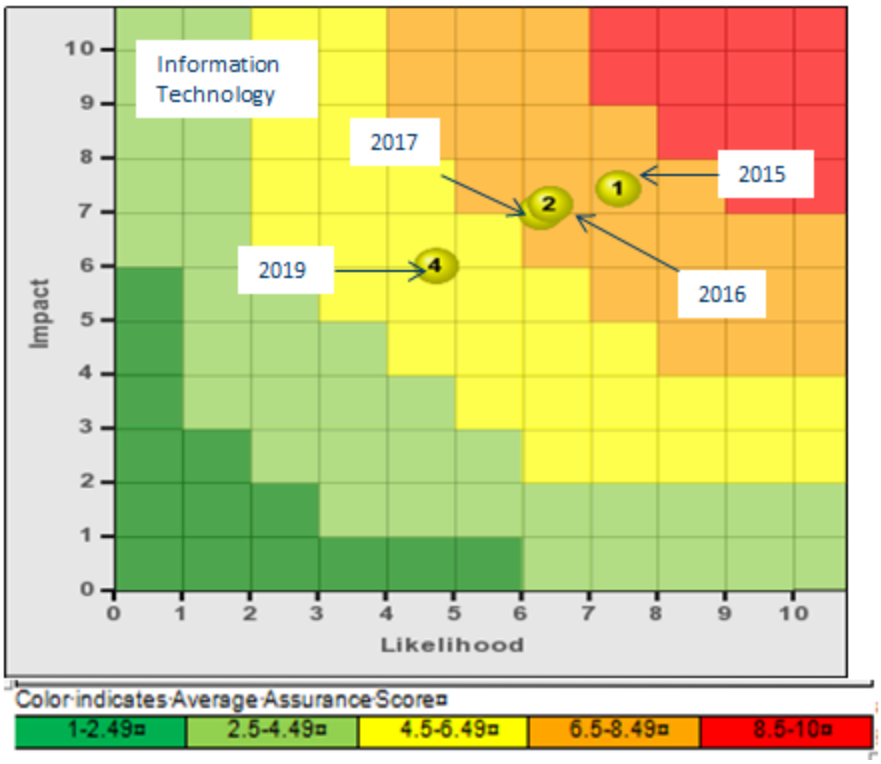

| | Impact | Likelihood | Assurance | Inherent Index | Residual Index |
|---|---|---|---|---|---|
| **2015** | 6.63<br>Serious | 6<br>About as likely as not | 4.88<br>Could be improved | 40.63<br>Moderate | 219.75<br>High |
| **2016** | 6.75<br>Serious | 5.63<br>About as likely as not | 4.63<br>Could be improved | 39.13<br>Moderate | 205.75<br>High |
| **2017** | 6.63<br>Serious | 5.38<br>About as likely as not | 4.63<br>Could be improved | 35.75<br>Moderate | 175.63<br>Moderate |
| **2019** | 6.56<br>Serious | 5.67<br>About as likely as not | 4.67<br>Could be improved | 37.33<br>Moderate | 193.44<br>Moderate |

Operational Capacity is assessed as a moderate risk source from both the inherent and residual risk index perspectives. This is consistent from the 2017 assessment. A slight increase in the assessed likelihood, coupled with a decrease in assurance, drove the residual risk index higher from 176 to 195. This is one of only two risk sources to increase/worsen since 2017 (Planning and Execution is the other). Having a strong organizational capacity is fundamental to the Agency's ability to implement effective strategies and fulfill its mission. Additional funding appropriated to the Agency in the 2019 legislative session, and the establishment of the Agency's new motto to "Go Big so Everyone Can go Home," makes increasing operational capacity absolutely mission critical. The following list identifies a number of key challenges the Agency faces regarding its ability to maintain and build operational capacity:

- Changes in Agency leadership since 2017 include the appointment of a new Commissioner, Deputy Commissioner, Multifamily Division Assistant Commissioner, and Human Resources Director. Additionally, the Agency Chief Information Officer resigned for a new opportunity in January 2020. These changes necessitate strong change management skills throughout the Agency.
- Approximately twenty-five percent of Agency employees are eligible to retire in the next five years.
- State and federal unemployment rates are at or near historic lows, and state salaries for some managerial and professional positions are not competitive with the private sector. These two factors make it more difficult to recruit a pool of qualified replacements.
- The business of financing affordable housing is increasingly complex, leading to the possibility that positions will need to be upgraded to attract qualified replacements.
- In some areas of the Agency, staffing levels remain a concern due to increasingly high volumes of work and significant process and systems changes. Certain key positions are sometimes challenged to keep up with all of the demands and priorities.
- As a small Agency, it can be difficult to identify back-ups and duplication for some key roles.

**Effectiveness of Control/Mitigation Activities:**
Strengthening the financial and organizational capacity of the Agency is a priority of the 2020–2022 Strategic Plan. These efforts will focus on attracting and retaining a skilled, committed and diverse staff. The Agency has added staff and other resources since 2017, and has additional resources budgeted for 2020 (e.g., additional staff, training and development, technology). The Agency assesses the training and development needs of all staff and identifies and selects training programs. The Agency will continue to offer and emphasize professional development opportunities (e.g., mentor program, job shadowing, individual development plans) for staff to build their skill sets. Additionally, the Agency offers flexible work schedules, including telework options, and continues to promote and support innovation, process reengineering, and improved technology to attract a competitive workforce and improve staff efficiency and productivity. All employees have individual work plans and every staff member receives a performance review annually.

### 4) Information Technology – Moderate Inherent and Residual Risk Levels




| | Impact | Likelihood | Assurance | Inherent Index | Residual Index |
|---|---|---|---|---|---|
| **2015** | 7.43<br>Serious | 7.43<br>Likely | 5.43<br>Could be improved | 55.43<br>High | 310.86<br>High |
| **2016** | 7.14<br>Serious | 6.43<br>About as likely as not | 5.14<br>Could be improved | 47.43<br>High | 262.29<br>High |
| **2017** | 7<br>Serious | 6.29<br>About as likely as not | 5.14<br>Could be improved | 45.86<br>High | 256<br>High |
| **2019** | 6<br>Moderate | 4.75<br>About as likely as not | 4.5<br>Could be improved | 30.25<br>Moderate | 148<br>Moderate |

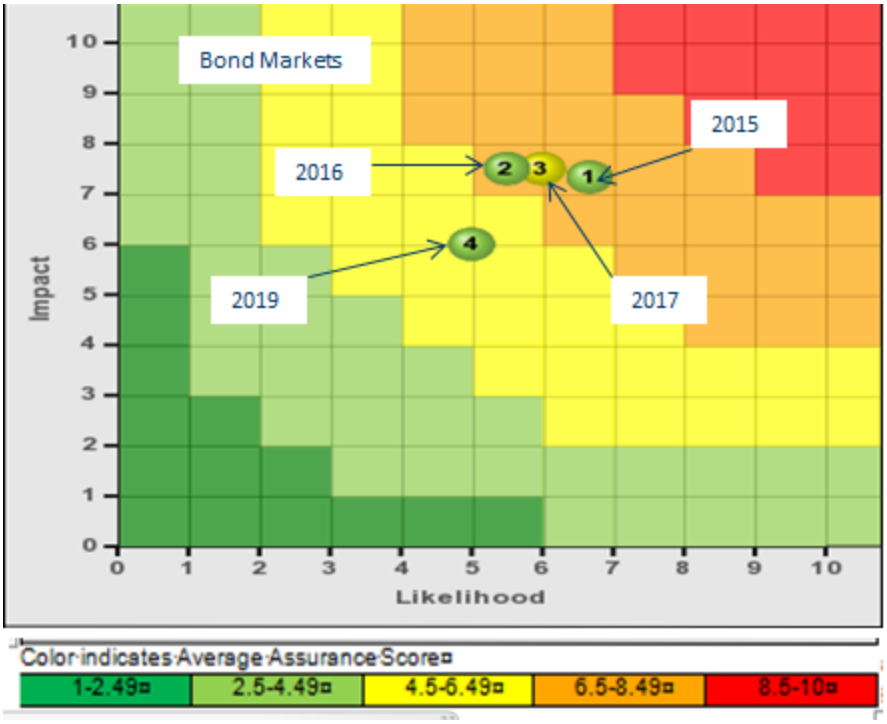
Information Technology (IT) is assessed as a moderate risk source based upon the inherent and residual risk index scores, both of which are significantly lower from the 2017 assessment. Assessed impact, likelihood, and assurance scores are all much lower this year which drove both index scores lower. While Information Technology is viewed as less risky this year, it continues to score as one of the top four Agency risks and it is managed accordingly. The Agency's work environment consists of complex housing and finance markets, numerous legal and regulatory rules, and many counterparties. Each aspect of this environment requires information technology systems to effectively manage these variables. Systems in place today have been generally effective, and they have passed risk, audit, and compliance standards tested during the most recent annual financial audit. The need to adapt quickly to increasing compliance requirements and changes in the types and sophistication of funding sources used to pay for Agency

programs underscores the need for superior technology. Multifamily Remodel, Multifamily Loan Servicing Software, Single Family Loan Origination System, Business Intelligence tools, Customer Relationship Management, and Enterprise Content Management are major projects with significant technological components that have been recently implemented, or are currently underway. There is visible senior leadership for technology and business process improvement, and increased staff communication regarding information technology systems projects. There is also a formalized process to identify, request, explore, approve and track new technology projects. Nonetheless, risks to implementing efficient and effective IT systems remain. Those risks include:

- The current CIO is in their role on an interim basis while a permanent CIO is being recruited.
- Ongoing challenge recruiting information technology management talent given the state's compensation constraints for these professional positions.
- Business line and Business Technology Support (BTS) personnel must develop deeper understanding of the business requirements to determine the most effective technology solutions.
- Communications between business lines and BTS personnel must be enhanced to implement the most effective technology solutions.
- Strong project management practices and realistic timelines are needed to successfully implement technology solutions.
- Adequate staff resources both in BTS and the business lines are needed to support Agency information technology systems projects.
- Current State of Minnesota contracting procedures can add time to the process of procurement.
- Agency-wide initiatives compete for BTS resources, which impacts project delivery and prioritization.

**Effectiveness of Control/Mitigation Activities:**
In recent years, the Agency has increased both its BTS staffing and operations budget, and has adopted a process to identify, request, explore, approve, and track new technology projects. The Agency has a Continuity of Operations Plan and an off-site "hot" site for its technology operations. The Agency has a Business Technology Investment Committee (BTIC) comprised of Agency leadership to prioritize and coordinate technology investments. The CIO and Deputy Commissioner meet regularly to align resources for technology projects.

### 5) Bond Markets – Moderate Inherent and Residual Risk Levels



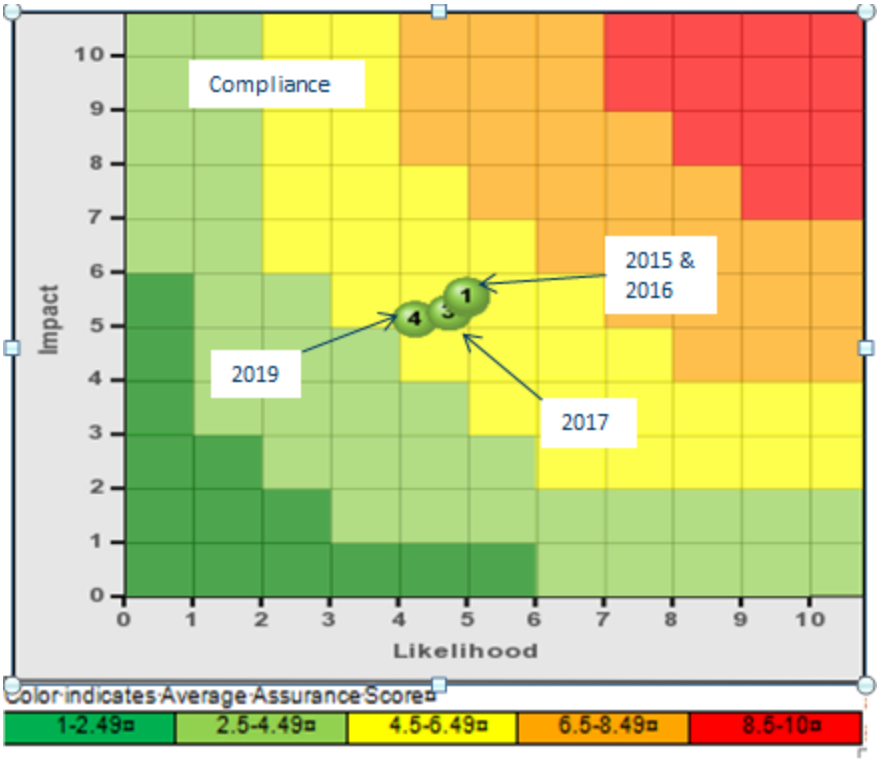

| | Impact | Likelihood | Assurance | Inherent Index | Residual Index |
|---|---|---|---|---|---|
| 2015 | 7.33<br>Serious | 6.67<br>Likely | 4<br>Good | 49<br>High | 214.67<br>High |
| 2016 | 7.5<br>Serious | 5.5<br>About as likely as not | 4<br>Good | 42.25<br>High | 191<br>Moderate |
| 2017 | 7.5<br>Serious | 6<br>About as likely as not | 4.5<br>Could be improved | 46<br>High | 234<br>High |
| 2019 | 6<br>Moderate | 5<br>About as likely as not | 3.5<br>Good | 30.75<br>Moderate | 131.5<br>Moderate |

Bond Markets are assessed as a moderate risk score from both the inherent and residual risk index score perspectives. This represents a decrease in risk from the previous assessment. Assessed impact, likelihood, and assurance scores all decreased significantly which drove down the two risk index scores to their lowest level over the four-year review period. The Agency relies on the capital markets to fund its largest revenue-producing lending products. Rapid change in the capital markets could make it difficult to raise capital at rates that allow the Agency to reloan the proceeds at competitive rates while still earning sufficient spreads to fund its programs and maintain a strong financial position. Loan originations continue to be very strong, requiring that Minnesota Housing access the bond markets on a regular basis. Increasing pressure on the availability of tax-exempt bond volume cap for single family and multifamily financing is a threat to achieving the priorities and goals established in the Strategic and

Affordable Housing Plans. Limited capacity in tax-exempt bonding and/or changes in bond statutes could constrain the number of future developments the Agency would be able to fund.

**Effectiveness of Control/Mitigation Activities:**
While there is nothing the Agency can do to influence bond market pricing over time, the Agency employs a technically competent finance team experienced in managing during periods of volatility. Also, the Agency contracts with external financial advisors, bond underwriters, trustees, and legal counsel to provide independent advice and assistance regarding bonding matters. As a public entity, the Agency has access to multiple types of bonds: taxable and tax-exempt. The Agency can use a tax-exempt mortgage-backed securities monthly pass-through structure or shift to selling off loan production in the To Be Announced (TBA) market without having to sell bonds, if that proves to be a more attractive financing alternative. Additionally, the Agency employs a loan financing strategy that utilizes the tax-exempt sales of single mortgage-backed securities to enhance a flexible and nimble response to changing market conditions.

### 6) Compliance – Moderate Inherent and Residual Risk Levels




| | Impact | Likelihood | Assurance | Inherent Index | Residual Index |
|---|---|---|---|---|---|
| **2015** | 5.57<br>Moderate | 5<br>About as likely as not | 4.43<br>Good | 30.57<br>Moderate | 154<br>Moderate |
| **2016** | 5.5<br>Moderate | 5<br>About as likely as not | 4.25<br>Good | 30.38<br>Moderate | 151<br>Moderate |
| **2017** | 5.25<br>Moderate | 4.75<br>About as likely as not | 4.25<br>Good | 27<br>Moderate | 131.88<br>Moderate |
| **2019** | 5.13<br>Moderate | 4.25<br>Unlikely | 4.25<br>Good | 24.13<br>Moderate | 121.5<br>Moderate |

Compliance continues to be assessed as a moderate risk source. Compliance received its highest ranking (sixth) over the four-year review period, even though the inherent and residual risk scores are both lower than in 2017. Compliance impacts every part of the Agency. Minnesota Housing is responsible to uphold state and federal rules and regulations related to a wide variety of programs. Each Agency funding source and program (old, existing, new) involves compliance requirements, many of which are very complex and specific. New and ever-changing compliance requirements, highly complex rules and regulations for our programs and funding sources, and uncertainty regarding the applicability of some requirements to our Agency due to the nature our business, are realities that must be managed effectively to avoid regulatory criticism, potential fines or repayment of funds, and damage to Agency reputation. Newer programs such as National Housing Trust Fund, Homework Starts with Home, and

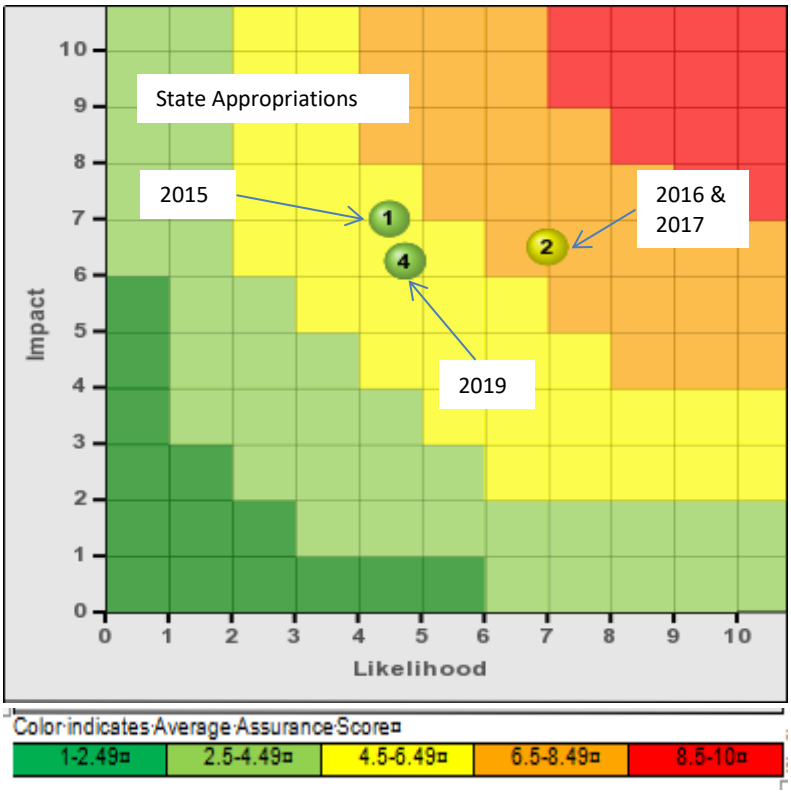
Greater Minnesota Workforce Housing have specific compliance elements that require increased staff training and additional monitoring procedures on top of the rigor required to establish the new program infrastructure and processes.

**Effectiveness of Control/Mitigation Activities:**
Experienced staff skilled in compliance are employed throughout the organization, and key staff continue to build capacity to ensure compliance protocols are embedded in all programs. Several compliance-related risk mitigation actions and projects have recently been completed, or are in process, including:

- Both the Single Family and Multifamily Divisions have qualified staff specifically, or in part, designated to oversee compliance activities.
- The Single Family Division has an Operational Risk team that provides servicer oversight and performs daily quality assurance audits. The Division also employs a Compliance Analyst and will be hiring an additional Compliance Specialist, and the Legal Department will be hiring an attorney whose primary focus will be Single Family Division compliance.
- In 2019, Single Family developed and implemented a comprehensive Compliance and Training Plan.
- The Multifamily Property Online Reporting Tool (PORT) was built in-house to encompass the programmatic compliance requirements for the Low Income Housing Tax Credit (LIHTC) program and the Agency's deferred loan sources (PARIF, EDHC, HTF). Since deploying this system, we have continued to modify and improve the PORT system through ongoing quality control of property records, improved and expanded functionality of compliance analysis reports and report building tools, and system add-ons to account for federal and state regulatory changes. The PORT system now contains over 1,400 property records and remains a reliable source of truth on property details. The PORT system is a critical workflow management tool to ensure that the Agency performs and completes the monitoring duties (inspections, file reviews, collecting annual compliance reports from properties) as required.
- The Minnesota Housing Employee Policies and Procedures Manual was significantly updated during 2019 to incorporate new human resources-related compliance requirements established by Minnesota Management and Budget.
- Related to Data Practices, the Agency has designated a Responsible Authority, Data Practices Compliance Officer and Division designees, updated the Data Practices Manual, and provided training to staff.
- The Agency remains engaged in a comprehensive grants management policy compliance effort.

The 2019 financial audit included a review of the Agency's level of compliance with major federal program requirements (i.e., Single Audit) and no findings or recommendations were reported. Finally, the Single Family Division maintains an open contract with a compliance consulting firm to advise on compliance matters, as needed.

## 7) State Appropriations – Moderate Inherent and Residual Risk Levels



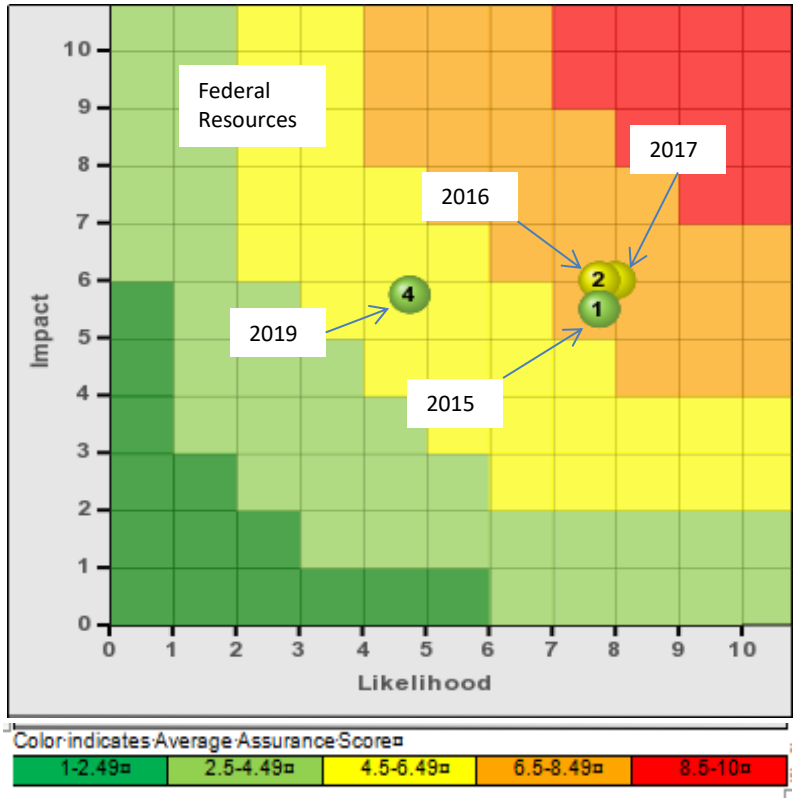

| | Impact | Likelihood | Assurance | Inherent Index | Residual Index |
|---|---|---|---|---|---|
| **2015** | **7**<br>**Serious** | **4.5**<br>**About as likely as not** | 3.5<br>Good | **30**<br>**Moderate** | **108**<br>**Moderate** |
| **2016** | **6.5**<br>**Serious** | 7<br>Likely | 5<br>Could be improved | 46<br>High | **240**<br>**High** |
| **2017** | **6.5**<br>**Serious** | 7<br>Likely | 5<br>Could be improved | 46<br>High | **240**<br>**High** |
| **2019** | **6.25**<br>**Moderate** | **4.75**<br>**About as likely as not** | 3.75<br>Good | **29.25**<br>**Moderate** | **119.25**<br>**Moderate** |

Assessed State appropriations risk has dropped significantly from the 2017 assessment when this risk source was rated high. Significant reductions in the inherent and residual risk scores, triggered by steep drops in assessed likelihood and assurance scores, now places this risk source in the moderate range. A reduction in state appropriations would negatively impact our ability to fulfill the 2020-2022 Strategic Plan and the 2020-2021 Affordable Housing Plan. State resources are critically important for funding certain homelessness programs including the Housing Trust Fund (HTF) which provides ongoing rental assistance and Family Homelessness Prevention and Assistance Program (FHPAP). State appropriations also fund newer programs like Homework Starts with Home, Workforce Housing and Manufactured

Home Park redevelopment, and provide funding for the Challenge program, an important source of gap financing for the Agency. Additionally, housing infrastructure bonding authority obtained through the legislative process is a significant source for multifamily gap financing as well as some single family activity.

**Effectiveness of Control/Mitigation Activities:**
The Agency employs an Assistant Commissioner for Policy and Community Development and a State Legislative Director who lead the Agency's funding request efforts at the state legislature. Agency programs are broadly supported by the bipartisan legislature, the Governor, and external advocacy groups. The Agency has a 40-year demonstrated track record in the development and preservation of affordable housing and strong financial stewardship. This record, coupled with a recognized, and well publicized, need for more affordable housing, resulted in an increase of $15 million in state appropriations for the 2020-2021 biennium, plus an additional $60 million in Housing Infrastructure Bonding authority. There is always uncertainty regarding the level of appropriation funding the Agency can count on given budget and revenue forecasts and legislative priorities. However, it would seem unlikely the Agency would see funding cuts in the foreseeable future given the overwhelming need for more affordable housing, and the State's strong financial position per the November 2019 forecast that shows a budget surplus for the 2020-2021 biennium and a fully funded rainy-day reserve.

## 8) Federal Resources – Moderate Inherent and Residual Risk Levels



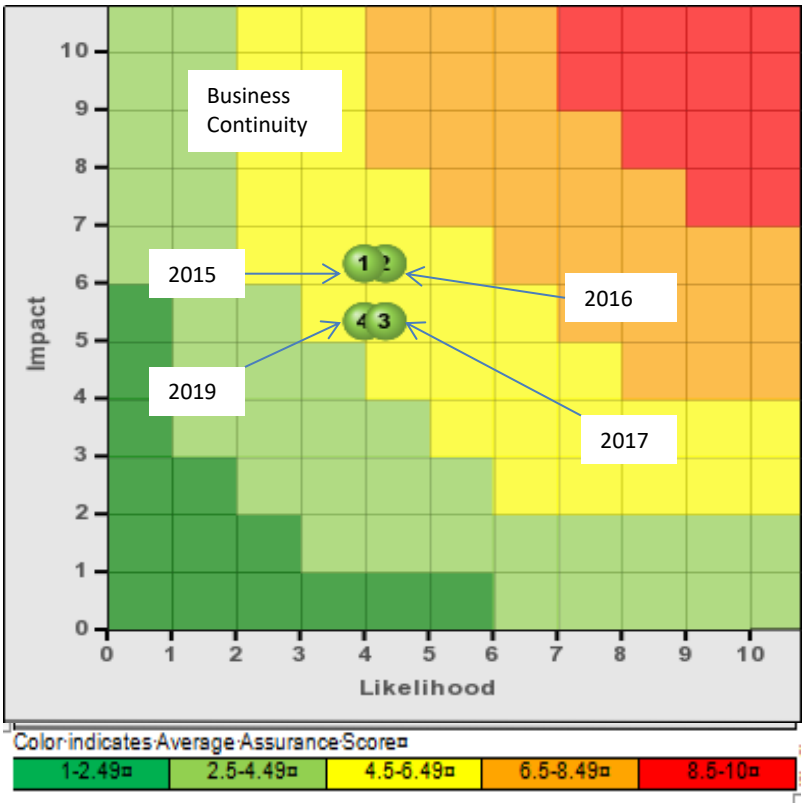

| | Impact | Likelihood | Assurance | Inherent Index | Residual Index |
|---|---|---|---|---|---|
| 2015 | 5.5<br>Moderate | 7.75<br>Likely | 4<br>Good | 43<br>High | 192<br>Moderate |
| 2016 | 6<br>Moderate | 7.75<br>Likely | 4.75<br>Could be improved | 46.25<br>High | 252.75<br>High |
| 2017 | 6<br>Moderate | 8<br>Likely | 4.75<br>Could be improved | 47.75<br>High | 257.25<br>High |
| 2019 | 5.75<br>Moderate | 4.75<br>About as likely as not | 3.5<br>Good | 27.75<br>Moderate | 100.75<br>Moderate |

Assessed risk of loss of federal resources has dropped significantly from the 2015, 2016 and 2017 assessment periods, when this risk source was rated as high. Significant reductions in the inherent and residual risk scores, driven by big drops in assessed likelihood and assurance scores, now puts this risk source in the moderate range. Federal funds are a critical source of funding for a number of Agency programs, including Low Income Housing Tax Credits (LIHTC), Section 8 rental assistance, National Housing Trust Fund, Section 811, and HOME. Loss or significant reduction of federal funding for these programs could result in more and larger project funding gaps, putting additional pressure on the Agency to use scarce Housing Affordability Fund (i.e., Pool 3) resources to fill those gaps. Pressures on the availability of taxexempt bonds for housing uses, continuing uncertainty regarding the selection

approach for Performance Based Contract Administration (PBCA) contracts, and the threat of federal government shut-downs, as occurred in early 2019, are concerns for the Agency.

**Effectiveness of Control/Mitigation Activities:**
The Agency actively participates in federal policy initiatives through its national organization, the National Council of State Housing Agencies (NCSHA), on which the Commissioner serves in a leadership role. Agency representatives meet regularly with the Minnesota congressional delegation and have recently increased federal outreach with other federal congressional members to discuss the positive impact of programs funded with federal resources. Continued funding of federal housing programs has been available throughout the past few federal administrations, even with divided political parties in the House and Senate. Regardless, the complexities of federal policymaking makes it a difficult risk source to mitigate.

## 9) Business Continuity – Moderate Inherent Risk Level/Low Residual Risk Level



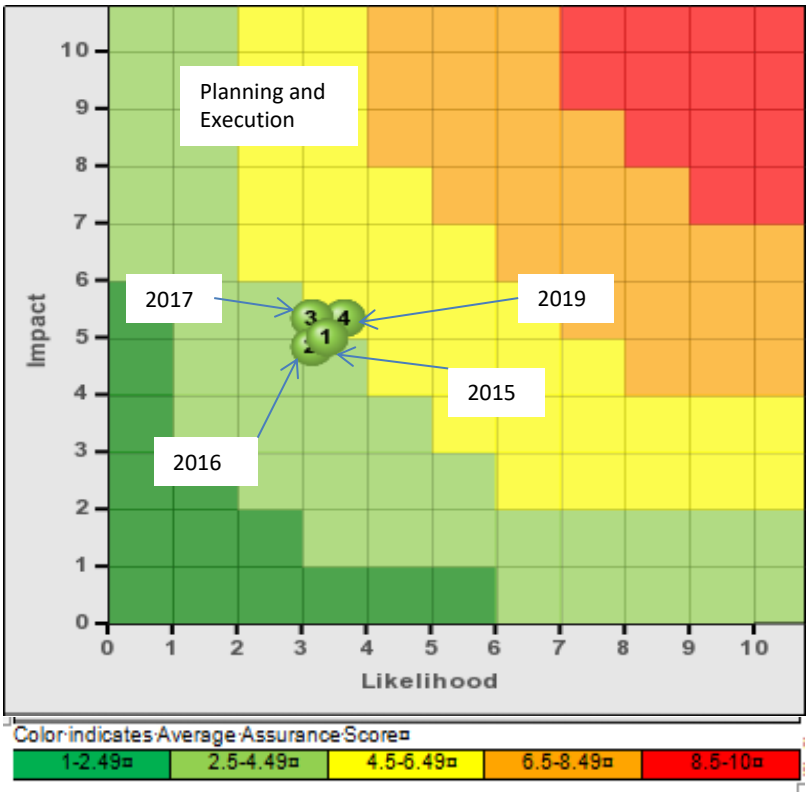

| | Impact | Likelihood | Assurance | Inherent Index | Residual Index |
|---|---|---|---|---|---|
| **2015** | 6.33<br>Moderate | 4<br>Unlikely | 2.67<br>Good | 26<br>Moderate | 74<br>Low |
| **2016** | 6.33<br>Moderate | 4.33<br>Unlikely | 3.67<br>Good | 29<br>Moderate | 113<br>Moderate |
| **2017** | 5.33<br>Moderate | 4.33<br>Unlikely | 3.67<br>Good | 25<br>Moderate | 97<br>Low |
| **2019** | 5.33<br>Moderate | 4<br>Unlikely | 3.67<br>Good | 22.67<br>Moderate | 87.67<br>Low |

Business continuity is assessed as a low risk source based upon the residual risk index score. The inherent and residual index scores are similar to those from the 2015-2017 assessments. Business Continuity is defined for this exercise as the activities performed by the Agency to ensure that critical business functions will be available to customers, suppliers, regulators, and other entities that must have access to those functions. The Agency has a Disaster Recovery Plan which includes a Continuity of Operations Plan (COOP) component. A BTS manager has been assigned responsibility for managing the Disaster Recovery Plan, COOP, and related activities.

**Effectiveness of Control/Mitigation Activities:**
The Agency's risk mitigation activities related to disaster recovery and business continuity are strong. Following are some of the key internal controls and activities:

- The Agency has a Business Technology Investment Committee comprised of senior leaders to coordinate and prioritize technology and business systems investments, include those relating to disaster recovery/COOP.
- The COOP Manager holds a "Certified Emergency Manager" professional designation.
- The Disaster Recovery Plan and COOP are reviewed, updated, and most importantly, tested annually.
- Agency has contracted for an alternative "hot" site processing center. The readiness and functionality of this site is included in the scope of the annual disaster recovery testing.
- The Disaster Recovery Plan, including COOP, is included in the scope of our annual financial audit. No findings or recommendations relating to disaster recovery/COOP were noted during the 2019 audit.
- The move to the new office location in 2017 included establishment of a new data center and back-up systems.
- Emergency contact information for the staff is up to date, and has been distributed to applicable managers.

## 10) Planning and Execution – Moderate Inherent Risk Level/Low Residual Risk Level



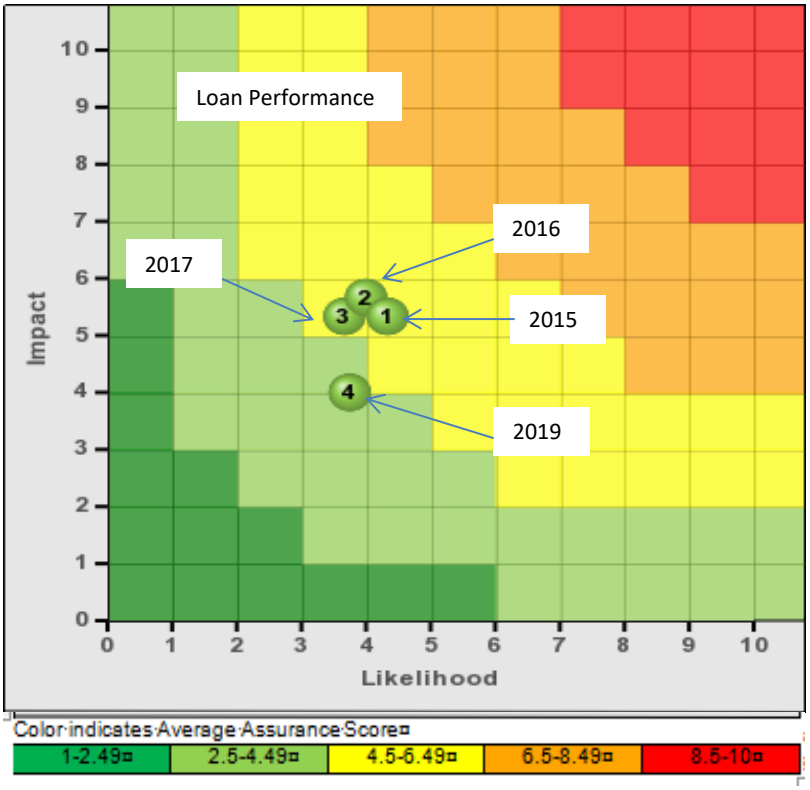

| | Impact | Likelihood | Assurance | Inherent Index | Residual Index |
|---|---|---|---|---|---|
| 2015 | 5<br>Moderate | 3.4<br>Unlikely | 3<br>Good | 19.2<br>Moderate | 60<br>Low |
| 2016 | 4.83<br>Moderate | 3.17<br>Unlikely | 3.17<br>Good | 17.17<br>Low | 52.83<br>Low |
| 2017 | 5.33<br>Moderate | 3.17<br>Unlikely | 3.17<br>Good | 18.17<br>Moderate | 54.83<br>Low |
| 2019 | 5.33<br>Moderate | 3.67<br>Unlikely | 3.33<br>Good | 21.83<br>Moderate | 86<br>Low |

Planning and Execution is only the second of the eleven risk sources to worsen since 2017 (Operational Capacity being the other). Even though the inherent and residual index scores both moved higher, this remains a low risk source, as it has over the four-year review period. New leadership at both the state and Agency level have identified their strategic goals and priorities. Adapting to and aligning the work at the Agency to address new goals and priorities has likely impacted the risk score. Effective planning is vital to any organization, especially one that makes significant financial investments in various programmatic areas like Minnesota Housing.

The Agency has an Strategy Management Framework that includes a “family” of planning and reporting documents and processes. The “head of the family" is the 2020-2022 Strategic Plan which was adopted by the Board in October 2019. The plan was developed based on robust research and analysis of housing and finance market data, and an extensive external community and internal staff engagement. It includes the Agency's vision, mission, priorities and strategies. Every two years, the Agency develops an Affordable Housing Plan, the two-year business plan that implements the Strategic Plan. (Prior to 2019, the Affordable Housing Plan was prepared annually.) The 2020-2021 Affordable Housing Plan was also recently adopted by the Board. The Affordable Housing Plan includes funding by program area, estimated number of households assisted and units produced, as well as other work plan highlights. Divisional work plans are based on the Affordable Housing Plan and then individual work plans are developed to support divisional work plans. All plans are aligned with the Strategic Plan. Each plan has one or more corresponding reporting documents containing a variety of performance measures. Regularly scheduled reporting of results against plan takes place, including annual performance appraisals for every Agency employee, supervisor, and manager.

**Effectiveness of Control/Mitigation Activities:**
The Strategy Management Framework is continuously refined and updated. This year’s refinements focused on identification and implementation of better performance measures and improving individual work plans, particularly around goal setting and learning objectives. For the past three years, 100% of the employees’ performance appraisals were completed. Appraisals measure the degree to which individual work plan goals have been accomplished. The Agency has a skilled team responsible for overseeing all of the Agency's planning, research, and evaluation. Planning is well supported by the Servant Leadership Team and is a highly visible part of the organization. The State’s Continuous Improvement Steering Committee provides quality resources and guidance.

### 11) Loan Performance – Moderate Inherent Risk Level/Low Residual Risk Level




| | Impact | Likelihood | Assurance | Inherent Index | Residual Index |
|---|---|---|---|---|---|
| 2015 | 5.33<br>Moderate | 4.33<br>Unlikely | 3<br>Good | 23.33<br>Moderate | 71.67<br>Low |
| 2016 | 5.67<br>Moderate | 4<br>Unlikely | 3<br>Good | 23<br>Moderate | 71<br>Low |
| 2017 | 5.33<br>Moderate | 3.67<br>Unlikely | 2.67<br>Good | 19.67<br>Moderate | 51<br>Low |
| 2019 | 4<br>Minor | 3.75<br>Unlikely | 2.75<br>Good | 15.75<br>Low | 44<br>Low |

Loan Performance is assessed as a low risk source. From the residual index score perspective, this assessment is unchanged from the previous three assessment periods. The Agency has two main loan types: Single Family and Multifamily. For single-family loans to homeowners, loans have benefitted from sustained and increasing home values, though downturns in the single-family home markets remain a risk. The Agency's single-family mortgage whole loan portfolio continues to shrink as loans are paid down, and new loans are funded with Mortgage Backed Securities, reducing the Agency's risk of loss from foreclosures. Multifamily loans that are on larger rental projects benefit from a strong rental market with historically low vacancy rates. The portfolio is performing well without significant defaults with

many being fully repaid. New loan production is partially insured by the HUD Risk Share program, further reducing risk.

**Effectiveness of Control/Mitigation Activities:**
For the Agency's single-family lending, loan performance is carefully tracked and monitored by compliance staff within the Agency for any indication of challenges in the market or underwriting standards. In addition, migration from a single-family whole loan model to a Mortgage Backed Securities model has largely kept the Agency immune from severe financial losses that might result from a downturn in home values in the market. For multifamily lending, the Agency employs experienced lending and underwriting staff who maintain up-to-date loan origination, operations, and asset monitoring policies and procedures to control loan performance risk. Many of those staff members serve on one or both of the Agency's two credit-related committees — Clearinghouse and Mortgage Credit — that review and approve all applications for credit. The Agency also has a Credit Risk team that reviews and analyzes borrowers' ability to service and repay the loans applied for. The committees review the analysis and discuss applicant credit worthiness for all individuals and organizations applying for Agency funding.

# Appendix A

**Risk Impact**

Assess each risk factor according to the criteria below. Do not grant credit for existing controls or mitigating strategies. Do not consider how often the impact may occur. Instead, rate as if the factor manifests itself without controls one or more times. Only one criterion for an impact level need apply to assess at that level.

**9 – 10 Major**

- Negative impact on Net Assets – over $250 million
- Catastrophic impact on financial statements (e.g., critical contractual ratios are no longer met).
- Liability threats challenge the going concern status of the Agency.
- Long-term impairment of critical functions makes the Agency vulnerable to mission failure.
- Non-compliance with Federal/State law, statue, or rule.
- Agency's Strategic Plan cannot be achieved.
- Agency's Affordable Housing Plan cannot be achieved.
- Identified issues are serious variations from the organization's values (e.g., Fraud, Conflict of Interest).
- Process owner has not completed an evaluation of segregation of duties for employees' assigned tasks.
- Process generates unusual transactions.
- Activities are very complex. Employee training to perform activities is lengthy. Judgment is critical in performance of activities and is mostly principles based.

**7 – 8 Serious**

- Negative impact on Net Assets – $100 million to $250 million
- Regulatory penalties are required.
- Serious liability or lawsuit potential.
- Financial ratings drastically revised.
- Serious long-term Agency brand (reputation) impairment.
- Significant negative impact on ability to achieve Strategic Plan.
- Significant negative impact on ability to achieve Affordable Housing Plan.
- Issues significantly contrary to organizational values.
- Process owner has evaluated employees' assigned duties within the process and determined that there are existing concerns related to incompatible duties.
- Process generates estimation transactions.
- Activities are very complex. Employee training to perform activities is lengthy. Judgment required in decision-making is mostly rules based.

**5 – 6 Moderate**

- Negative impact on Net Assets – $50 to $100 million
- Impaired business functions cause customer service to significantly deteriorate.
- Moderate Agency brand (reputation) issues.

- Moderate liability (e.g., lawsuits) potential.
- Business practices significantly inconsistent with industry standards.
- Moderate negative impact on the Agency's Strategic Plan.
- Moderate negative impact on the Agency's Affordable Housing Plan
- Identified issues are inconsistent with the Agency's values.
- An evaluation of segregation of duties for employees' assigned tasks has not be completed.
- Process generates non-routine transactions.
- Moderate activity complexities; Moderate individual judgment; few aspects of operation covered by established practices. Employee training to perform activities is lengthy.

**3 – 4 Minor**

- Negative impact on Net Assets – $10 to $50 million
- Inconvenient impact on critical business functions.
- Compliance issues should be easily resolved with only minor financial consequences.
- Small and temporary impact to Agency brand (reputation).
- Strategic Plan will not be impaired or impact will not require altering the plan.
- Affordable Housing Plan will not be impaired or impact will not require altering the plan.
- An evaluation of segregation of duties shows no issues and is sufficiently documented and verifiable.
- Process generates routine transactions that do not relate to the company's primary business activities.
- Activities are low complexity. Some individual judgment required.

**1 – 2 Insignificant**

- Negative impact on net income – less than $10 million
- Critical functions will not be impaired.
- No liability or threats to Agency brand (reputation).
- A segregation of duties evaluation has determined that there are no existing concerns within the past 12 months. The evaluation is sufficiently documented and verifiable.
- Process generates routine transactions related to the company's primary business activities.
- Activities are relatively straightforward. Employee training for activity performance is very minimal.

## Likelihood

Assess the likelihood that the impact of the risk factor occurs. Do not consider the mitigation effect of existing controls.

**9 – 10 Major Highly Likely**

At least 90% probability – Expected to occur in most circumstances
Within the past 12 months, the following conditions have existed within the process:

- Task errors not predictable, limits not established.
- Major activity bottlenecks, impact on upstream or downstream functions.
- Staff has little or no experience, skills, training, and certifications.
- Major transactional changes (e.g., major volume spikes, contractual changes).

- Changes in key personnel or staff.

**7 - 8 Likely**
At least 66% but less than 90% probability – Will probably occur in most circumstances
Within the past 12 months, the following conditions or indicators have existed within the process:

- Task errors often in excess of approved limits
- Activity bottlenecks, impact on upstream or downstream functions
- Staff has insufficient skills, training, and certifications
- Significant transactional changes (e.g., major volume spikes, contractual changes)
- Changes in personnel or staff

**5 - 6 About as likely as not**
At least 33% but less than 66% probability – Might occur at some time
Within the past 12 months, the following conditions or indicators have existed within the process:

- Task errors occasionally in excess of approved limits.
- Shortages in staffing levels.
- Thinly experienced and skilled staff.
- Moderate transactional changes (e.g., volume, nature).
- Some changes in key personnel or staff.

**3 - 4 Unlikely**
At least 10% but less than 33% probability – Could occur at some time
Within the past 12 months, the following conditions or indicators have existed within the process:

- Task errors within approved limits.
- Reasonable staffing levels.
- Adequately experienced and skilled staff.
- Minimal transactional changes (e.g., volume, nature).
- Minimal changes in key personnel or staff.

**1 - 2 Rarely, if ever**
Less than 10% probability – May only occur in exceptional circumstances
Within the past 12 months, the following conditions or indicators have existed within the process:

- Task errors within approved limits.
- Appropriate staffing levels.
- Highly experienced and skilled staff.
- No change in volume and nature of transactions.
- No change in key personnel or staff who perform or monitor controls.

## Assurance (Effectiveness of Mitigation Activities)

Assess the effectiveness of existing procedures, mitigating strategies and overall Agency-wide controls, regardless of which business area performs activities (i.e., activities do not have to be performed by areas or employees reporting to you). Mitigation or controls can be written policies and procedures, fraud risk assessments, control automation, control self-assessments, standard management reporting, etc. Assess controls that mitigate the selected risks based on criteria below.

Tip: You may conclude that you rely on activities performed by other business areas to mitigate risks in your business area. If this is the case, you may assess controls provided by other business areas as you understand them, or you may request other business areas to assess control assurance from their base of knowledge. Regardless of your approach, be sure to document your reasoning.

**9 - 10 Ineffective**

Control effectiveness is not driven by the organization, but is solely dependent on each individual's background and standards.

Within the past 12 months, the following indicators have existed within the process:

- Ineffective and fragmented controls.
- Undocumented procedures, mitigating strategies, entity-wide controls.
- Inappropriate or no guidance from “tone at the top” (control environment).
- General inability of key personnel or staff to design and execute effective, cohesive mitigating activities.

Within the past 12 months, the following conditions have existed within the process:

- No written guidance for performing tasks
- Key controls that mitigate the risks are mostly manual
- No participation in a control self-assessment program

**7 – 8 Poor**

Organizational values and behavior expectations are not well defined or consistently understood beyond management.

Within the past 12 months, the following indicators have existed within the process:

- Controls are documented but not performed consistently.
- Controls are only partially effective, and the area copes as best they can.
- No documented accountability.
- Clear evidence of ongoing internal conflicts in the area.
- Ineffective or no internal monitoring of controls.

Within the past 12 months, the following conditions have existed within the process:

- Some written task guidance in various forms (e.g., personal notes), but may not immediately be available to auditors due to inconsistent format and/or unapproved status.
- Key controls that mitigate the risks are mostly manual and hybrid.
- Limited participation in a control self-assessment program.

**5 – 6 Could be improved**
Comprehensive policy statements on organizational values and behavior expectations are published to all internal and external stakeholders.

Within the past 12 months, the following indicators have existed within the process:

- Compliance with written policies and procedures at all levels is accepted as the norm.
- Controls documented and generally performed, but are not sufficiently responsive to operational changes.
- Internal monitoring exists but significant deficiencies in effectiveness were observed.
- Some written procedures and standards exist, but may not be sufficiently clear or comprehensive.
- Accountability is not enforced.

Within the past 12 months, the following conditions have existed within the process:

- Written task guidance for important aspects; immediately available to auditors upon request.
- Key controls that mitigate the risks are a combination of automated, hybrid, and manual.
- Full participation in a control self-assessment program.

**3 – 4 Good**
Cultural norms ensure compliance with organizational values and policies at all levels. Employees believe that 'no one is above the law' because Management's "tone at the top" demonstrates they embrace organizational values in their daily actions.

Within the past 12 months, the following indicators have existed within the process:

- Organizational values and policies require both short- , mid- and long-term benefit.
- Formalized processes exist to ensure that organizational values and policies remain the norm.
- Controls are effective, documented and followed on most occasions.
- Clear ownership of control responsibility and role accountability.
- Controls are responsive to operational changes.
- Technically competent and experienced staff with some turnover.
- No significant deficiencies observed in internal monitoring.
- Management participates in control self-assessment activity or controls have been reviewed by groups independent of management (e.g., internal audit) in the past three years.

Within the past 12 months, the following conditions have existed within the process:

- External audit has reviewed controls within the past 2–3 years with satisfactory results.
- Key controls that mitigate the risks are primarily automated and hybrid.
- Full participation in a control self-assessment program.
- Written task guidance is comprehensive, including (i) how and when to perform tasks; (ii) what tasks are supposed to achieve; (iii) how to handle exceptions; (iv) how tasks affect the process; and (v) how tasks affect upstream and downstream processes.

**1 – 2 Effective**
Board, management and employees alike demonstrate through their actions that behavior outside of organizational values and policies is unacceptable.

In the past 12 months, the following indicators have existed within the process:

- Accountability at all levels is culturally driven.
- Embedded ability to take advantage of short-term opportunities while ensuring long-term viability due to continuous discipline and sound ethical decision-making skills at all levels.
- Effective, documented controls are in place.
- Technically competent and experienced staff with minimal turnover.
- Highly effective management review takes place.
- No deficiencies observed in control environment (e.g., procedure manual, controls well documented, clear standards and trending for control exceptions).
- Management participates in control self-assessment activity or controls have been reviewed by groups independent of management in the past two years.

Within the past 12 months, the following conditions have existed within the process:

- External audit has reviewed controls within the past year with satisfactory results.
- Key controls that mitigate the risks are primarily automated and hybrid.
- Full participation in a control self-assessment program.
- Written task guidance is comprehensive, including (i) how and when to perform tasks; (ii) what tasks are supposed to achieve; (iii) how to handle exceptions; (iv) how tasks affect the process; and (v) how tasks affect upstream and downstream processes.

# Appendix B

| **Section A: Inherent Risk Score Table** | | | | | | |
|---|---|---|---|---|---|---|
| **Risk Source Description:** | | ***Likelihood - that the assessed impact of the risk source occurs*** | | | | |
| | | 1 - 2<br>Rarely if ever<br>May occur only in exceptional circumstances | 3 -4<br>Unlikely<br>Could occur at some time | 5 - 6<br>About as likely as not<br>Might occur at some time | 7 - 8<br>Likely<br>Will probably occur in most circumstances | 9 - 10<br>Major Highly Likely<br>Expected to occur in most circumstances |
| ***Impact - Overall effect to the organization*** | 9 - 10 Major<br>Would stop achievement of goals and objectives | Moderate | High | High | Very High | Very High |
| | 7 - 8 Serious<br>Would threaten goals and objectives; requires close management | Moderate | Moderate | High | High | Very High |
| | 5 - 6 Moderate<br>Would necessitate adjustment to the overall function and require corrective action. May have a negative impact | Low | Moderate | High | High | High |
| | 3 - 4 Minor<br>Would threaten an element of the function. May cause small delays or have a minor impact on quality | Low | Low | Moderate | Moderate | High |
| | 1 - 2 Insignificant<br>Impact on function or its objectives is negligible. Routine procedures would be sufficient to deal with the consequences | Low | Low | Moderate | Moderate | High |

| Section B: Assessed Assurance - overall effectiveness of controls that mitigate the risk factor | | | | |
|---|---|---|---|---|
| 1 - 2 Effective | 3 - 4 Good | 5 -6<br>Could be improved | 7 - 8 Poor | 9 - 10 Ineffective |

| Section C: Residual Risk Score Table | | |
|---|---|---|
| **Risk Level** | **Residual Index Score** | **Definition** |
| Very High | Above 350 | Would prevent achievement of objectives, cause unacceptable cost overruns or schedule delays and requires close Executive attention |
| High | 201 to 350 | Substantial delays to project schedule, significant impact on technical performance or cost, and requires close management attention |
| Moderate | 101 to 200 | Requires identification and control of all contributing factors by monitoring conditions, and reassessment of program / project milestones |
| Low | 100 and below | Normal control and monitoring measures sufficient |

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MINNESOTA HOUSING

**Committee Agenda Item:** B
**Date: 2/27/2020**

**Item:** 2019 Annual Conflict of Interest Disclosure Reporting

**Staff Contact(s):**
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**Request Type:**

☐ Approval
☐ Motion
☐ Resolution
☒ No Action Needed
☐ Discussion
☒ Information

**Summary of Request:**
The purpose of this agenda item is to give a brief overview of the conflict of interest reporting processes and inform the Board about the results of the 2019 conflict of interest disclosure reporting.

The last Annual Conflict of Interest Disclosure Report was presented 2/21/19. The next report is scheduled to be delivered January or February 2021.

**Fiscal Impact:**
None

**Meeting Agency Priorities:**

☐ Improve the Housing System
☐ Preserve and Create Housing Opportunities
☐ Make Homeownership More Accessible
☐ Support People Needing Services
☐ Strengthen Communities

**Attachment(s):**

- Background
- Results of the 2019 conflict of interest disclosure reporting

**Background:**

It is Minnesota Housing's policy that all of its employees, including contractors and interns, be aware of, and make every effort to avoid actual, potential or perceived conflicts of interest. During 2019, management revised the Agency's conflict of interest procedures and disclosure forms. The procedures are incorporated in the Agency's Code of Ethics and Conflict of Interest policies contained in the Minnesota Housing Employee Policies & Procedures Manual.

Upon starting employment at Minnesota Housing, and annually thereafter, all employees are required to complete the Annual Conflict of Interest Disclosure Form. The form asks employees to disclose all external affiliations and business interests they and their immediate family members have (companies, partnerships, boards, councils, second employment, consulting contracts, or other applicable entities), and to identify those affiliations which may present conflicts with their official Agency duties. Any employees who identify personal or familial affiliations that present conflict of interest risk, as determined by the Deputy Commissioner, General Counsel, and Chief Risk Officer, are issued a Conflict of Interest Actions Memorandum which outlines actions the individual must follow to avoid or mitigate the conflict risk. The employee's immediate supervisor and the Director of Human Resources are copied on the memorandum.

Agency conflict of interest procedures also require employees to request management approval prior to accepting secondary external employment or other external affiliation (e.g., Board membership). For each request, the Deputy Commissioner, General Counsel and Chief Risk Officer evaluate the request for conflict of interest risk. If determined that conflict of interest risk is present, the request may be denied or approved with issuance of a Conflict of Interest Actions Memorandum which outlines the actions the employee must follow to avoid or mitigate the conflict risk.

**Results of 2019 Annual Conflict of Interest Reporting:**

- Between August and September 2019, 256 employees electronically completed the Annual Conflict of Interest Disclosure Form.
- Seventy-one of the 256 employees identified personal or familial affiliations that were evaluated for conflict of interest risk. Twenty-nine of those 71 employees were issued a Conflict of Interest Actions Memorandum.
- During 2019, nine employees were granted approval to accept secondary external employment or external membership affiliation, subject to risk mitigation actions outlined in the approval of request memorandum from the Chief Risk Officer.
- During 2019, five new employees were approved to retain existing external affiliations/memberships present at the time they started employment with the Agency, subject to the risk mitigation actions outlined in the approval of request memorandum from the Chief Risk Officer.

MINNESOTA HOUSING

**Committee Agenda Item:** C.
**Date: 2/27/2020**

**Item:** Ethics and Conflicts of Interest Review

**Staff Contact(s):**
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**Request Type:**

☐ Approval
- ☐ Motion
- ☐ Resolution

☒ No Action Needed
- ☒ Discussion
- ☐ Information

**Summary of Request:**
The purpose of this agenda item is to provide an overview of Board Members' Ethics and Conflicts of Interest Responsibilities

**Fiscal Impact:**
None

**Meeting Agency Priorities:**
- ☐ Improve the Housing System
- ☐ Preserve and Create Housing Opportunities
- ☐ Make Homeownership More Accessible
- ☐ Support People Needing Services
- ☐ Strengthen Communities

**Attachment(s):**
- Board Members' Handbook of Legal Issues

# Board Members' Handbook of Legal Issues

## August 2019 Edition

The Office of
Minnesota Attorney General Keith Ellison
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# INTRODUCTION

This manual is designed to be a guide for state boards, their members, and their staff. The Attorney General's Office hopes that the manual will serve both as a handbook for new board members and staff and as a reminder of relevant laws for those with more experience. The manual generally describes the role of boards in state government. It also discusses several important laws that apply to state boards' operations and activities. Although the manual is intended to be educational and informative, it should not be viewed as a substitute for boards seeking legal advice when specific situations raise questions of a legal nature.

# I. ROLE OF ADMINISTRATIVE AGENCIES IN GOVERNMENT

State boards are a type of administrative agency. In the case of licensing boards, the legislature has given the boards the power to regulate specialized professions for which licenses or certificates are required. Board members often include both persons in those professions and public members who bring other backgrounds, knowledge, and experience to board activities. Serving as a board member comes with important responsibilities that board members must take seriously. As outlined below, board members exercise various types of authority in making decisions, and they must remain mindful of the legislative and constitutional restraints on that authority.

## A. What is an Administrative Agency?

A fundamental principle of the U.S. Constitution requires that the executive, legislative, and judicial powers be exercised by separate branches of government, each of which may check or balance others' actions. Administrative agencies occupy a unique place in government because they have statutory authority to exercise all three types of powers while performing their official business. An administrative agency is an entity within the executive branch of government. It exercises its authority to enforce the statutes enacted by the Minnesota Legislature. By adopting rules to further implement applicable statutes, it exercises "quasi-legislative" authority granted by the legislature. Finally, similar to courts, agencies also have "quasi-judicial" power to resolve particular kinds of disputes and to require individuals to give testimony as witnesses.

Because administrative agencies combine the powers of all three branches of government, the very existence of early administrative agencies troubled courts. Courts resolved this issue by recognizing that the danger to citizens' liberty is not in blended power, but in unchecked power. Two checks on agency powers have been established. First, only the legislature may create agencies. The legislature must declare a legislative policy and establish primary standards for agency actions. Agencies have authority to fill in details, through rules or adjudication, but agency action must be consistent with legislatively determined policy. Second,

the judiciary operates as a check by retaining residual authority to prevent and rectify an agency's errors or abuses.

Judicial review of agency decisions is important. The role of the courts is twofold. First, courts ensure that the legislature does not unlawfully vest powers in an administrative agency. Second, courts ensure that administrative agencies exercise their powers within the limits set by the legislature and do so without violating anyone's rights. If a court finds that an agency exercised powers beyond the limits set by the legislature or that it violated a person's rights, the court may overturn the agency's decision or action.

### B. Administrative Agencies and the Due Process Clause

The due process clause is part of the Fourteenth Amendment to the U.S. Constitution and states, "No state shall . . . deprive any person of life, liberty, or property without due process of law . . . ." U.S. Const. amend. XIV, § 1. A professional license is a property right to which the Fourteenth Amendment applies. In reviewing board procedures related to the property rights of applicants or licensees, courts recognize two types of due process: substantive and procedural. Substantive due process requires that agency actions relate to the purpose for which the agency exists. Procedural due process requires that an agency deal fairly with those it regulates.

Due process primarily affects a board's adjudicative functions. A board acts in its adjudicative capacity whenever it reviews a particular individual or party's conduct, makes factual determinations based on its review, and issues an order affecting that specific individual or party. A party is entitled to notice of a proposed board action and, in some instances, to a "contested case hearing" before a board makes findings of fact or issues an order affecting the party. For further discussion of contested case hearings, especially in the context of licensing board activities, see section IV of this manual.

Boards must take great care in implementing their responsibilities. The requirements of procedural due process are contained in court interpretations of the U.S. and Minnesota Constitutions, Minnesota's Administrative Procedure Act, the rules of the Office of

Administrative Hearings, and other statutes and rules. Their purpose is to ensure fundamental fairness.

The law also requires boards to follow certain requirements in establishing jurisdiction, interpreting legislative standards, and imposing remedies. Courts may review actions of all boards to determine whether the boards have complied with due process requirements, acted within their jurisdiction, and interpreted the governing law reasonably.

## II. ROLE OF THE ATTORNEY GENERAL IN GOVERNMENT

Boards vary in their scope and authority. While boards are ultimately responsible for making factual findings and deciding matters before them, legal issues often arise in which the board seeks advice from the Attorney General's Office. This section outlines the role and structure of the office.

### A. Authority of the Attorney General

The power of the Minnesota Attorney General stems from three sources: the Minnesota Constitution, the Minnesota Statutes, and the common law derived from court decisions. The constitution establishes the Attorney General as the state's chief legal official within the executive branch. The Attorney General is elected by the state's voters. The Minnesota Statutes, particularly chapter 8, set forth some of the Attorney General's responsibilities. The Attorney General acts as the attorney for all state officers, boards, and commissions in matters pertaining to their official duties. Minn. Stat. § 8.06.

The Minnesota Supreme Court has described the expansive powers of the Attorney General:

> The attorney general is the chief law officer of the state. His powers are not limited to those granted by statute but include extensive common-law powers inherent in his office. He may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights. He is the legal adviser to the executive officers of the state, and the courts will not control the discretionary power of the attorney general in conducting litigation for the state. He has the authority to institute in a district court a civil suit in the name of the state whenever the interests of the state so require.

*Slezak v. Ousdigian*, 110 N.W.2d 1, 5 (Minn. 1961).

As an elected constitutional officer, the Attorney General has authority to make independent legal decisions, based on the public interest, regarding the representation of state agencies and boards. This authority distinguishes the relationship between the Attorney General and a client from the attorney-client relationship found in the private sector.

### B. Structure of the Attorney General's Office

The Attorney General's Office is divided into sections, each of which has several divisions. The Solicitor General and Deputy Attorneys General head up the sections. Division managers and section deputies are responsible for managing the divisions' day-to-day operations.

Many of the divisions have been created to serve the needs of particular departments and agencies within state government. The Transportation Division, for example, provides legal representation to the Minnesota Department of Transportation. Other divisions, on the other hand, exist to carry out special Attorney General responsibilities. The Antitrust and Utilities Division, for example, advocates for interests of residents and small businesses with respect to utility issues. In these matters, the Attorney General is the party rather than a state agency.

### C. Legal Representation of State Boards

State boards and board staff regularly seek legal advice on a variety of issues. Representation of non-health-related boards is largely consolidated in the office's Administrative Law Division. The Occupational Licensing Division provides representation to health-related boards.

When a matter proceeds to a contested case or a suspension proceeding, more than one attorney from the Attorney General's Office will become involved in the case. The first attorney will be the attorney for the board committee seeking action, while the second attorney will be the advising attorney for the board. The committee and advising attorney roles are discussed further in section IV.C of the manual.

## III. LICENSING BOARD RESPONSIBILITIES

As administrative agencies, licensing boards have only those powers that the legislature gives them in statutes. Chapter 214 of the Minnesota Statutes and boards' individual practice acts are the principal statutes that define and limit a licensing board's powers and responsibilities. Licensing board duties fall into two major categories: (1) granting and denying licenses and certifications, and (2) resolving complaints, which may include imposing discipline. The goals of board actions must always be to preserve the health, safety, and welfare of Minnesotans, and to act in the best interests of the public.

### A. Licensure and Certification

Boards have authority to ensure that only qualified persons engage in particular professions. The legislature has predetermined who is qualified for licensure by establishing the licensure requirements in each board's governing statutes. Whereas the disciplinary function of a board is often discretionary, a board's licensing or certifying function is largely "ministerial" in nature. A ministerial act involves executing specific standards that allow for little interpretation by a board. The legislature determines the qualifications needed for a profession by establishing specific education and experience requirements. If those requirements are met, a board may not deny licensure or certification, except as set out below. In this way, the legislature mandates that boards license or certify particular persons and withhold approval from others.

Although licensing or certification is largely ministerial, a board can exercise some discretion. First, while a board's governing statutes set mandatory requirements for licensure or certification, most boards are also given authority to adopt rules to implement the legislative standards. For example, even if a statute has a mandatory-examination requirement, the board has discretion to define in its rules the nature and scope of the examination or what constitutes a passing score.

Second, many boards' governing statutes require that applicants be of good moral character or that they have not engaged in conduct warranting disciplinary action. These types of requirements afford boards some discretion to decide how a statutory criterion applies to each

applicant. For example, if the evidence warrants, a board may deny a license to a person who has engaged in fraud under the "good moral character" requirement. Depending on the evidence in a particular case, a board's discretionary decision could range from restricting the scope of practice or requiring monitoring or supervision of a licensee or certificate holder to less stringent conditions such as requiring additional educational courses.

### B. Complaint Resolution

The second major licensing board function is the complaint-resolution process. While most boards follow a similar process, outlined in parts B.1-B.5 below, the Peace Officer Standards and Training (POST) Board has unique statutory procedures governing complaint resolution that are outlined in part B.6.

#### 1. Initial handling of complaints

The complaint-resolution process begins when a licensing board receives a complaint. Most complaints consist of a statement of grievances or allegations against a licensee or certificate holder and a request for board intervention. Complaints may be submitted by anyone, including a board member or board staff, and complaints may be submitted orally or in writing. Minn. Stat. § 214.10, subd. 1. Before an oral complaint is resolved, the complaint must be put in writing or transcribed. Boards should also review their specific statutes and rules to ensure they follow any required board-specific process for memorializing a complaint. A licensing board generally has the authority to act on any complaint that is jurisdictional. A complaint is jurisdictional if it "alleges or implies a violation of a statute or rule which the board is empowered to enforce." *Id.* Jurisdictional determinations relate exclusively to whether a board has legal authority to act based on the facts presented in the complaint. Whether a complaint is true or can be proven is irrelevant to the jurisdictional determination. If a complaint relates to matters within the jurisdiction of another agency, the board must refer the complaint to other agencies that may have jurisdiction. *Id.*

Many licensing boards have established a complaint committee or panel. The committee usually consists of one or more board members. The complaint committee may make

recommendations on how best to pursue a complaint. Options may include, for example, requesting the licensee's written response to the complaint, asking the complainant for additional information, referring the matter to an outside consultant for expert advice, scheduling a disciplinary conference or educational meeting, or dismissing the complaint. A board member who has had a financial or professional relationship with the subject of a complaint may be prohibited from participating in complaint-committee activities involving that person. A more detailed discussion of conflict-of-interest issues is in section VII.E of this manual.

**2. Investigating complaints**

Each licensing board has developed procedures for investigating complaints. A non-health licensing board's complaint committee can decide whether to obtain additional information regarding the complaint with the assistance of board staff and consult with the Attorney General's Office if legal questions arise. *Id.* § 214.10, subd. 2. Health licensing boards are required to refer any matter needing investigation to the Attorney General's Office. *Id.* § 214.103, subds. 4-5. Boards may sometimes want to hire an outside consultant to assist in investigating a particular complaint. If this is done, the consultant should sign a nondisclosure agreement to ensure the privacy of data related to the active investigation of the complaint. The collection, storage, and dissemination of data during a board's investigation of a complaint must be consistent with the requirements of the Minnesota Government Data Practices Act ("MGDPA"), which is found in chapter 13 of the Minnesota Statutes. While this section briefly provides an overview of how the MGDPA affects the investigation of complaints, section VII.D of this manual provides a more detailed discussion of the MGDPA.

The MGDPA classifies a complainant's identity as private data unless the complainant consents to disclosure. A complainant's identity therefore cannot be disclosed to third parties unless the complainant provides written permission to disclose. *Id.*§ 13.41, subd. 2(a). Also, before an investigator interviews people or asks them for information related to the complaint, the investigator should give a warning on using the data, commonly known as the Tennessen Warning, which is discussed in more detail in section VII.D.2. In short, the warning should be

given to all witnesses and to other third persons from whom information is sought whenever a government agency asks an individual to provide private or confidential information about himself or herself. *Id.* § 13.04, subd. 2. The warning should explain the purpose and intended use of the information by the agency, whether the individual is required to supply the information, any known consequences of giving or refusing to give the information, and the identity of other individuals or agencies authorized by law to receive the information. *Id.* In conjunction with this warning, it is a good idea to briefly describe the complaint-resolution process to the person from whom information is sought. Further, data collected and maintained as part of an active complaint against a licensee are classified as confidential under Minn. Stat. § 13.41, subd. 4. A board should take appropriate measures to protect the confidentiality of this data.

At the investigation stage, third parties do not have to provide requested information unless they are subpoenaed by the board or the board's statutes and rules require the third party to make the disclosure. Some boards' statutes specifically require third parties to provide information requested by a board's complaint committee without the necessity of issuing a subpoena. Licensing boards identified in chapter 214 can ultimately rely on the subpoena power granted in Minn. Stat. § 214.10, subd. 3, to obtain information relevant to a complaint. A board may enforce its subpoena in district court if the recipient does not respond to the subpoena.

After witnesses are interviewed and acquired documents are reviewed, an interview with the subject of the investigation may be required. That person may be contacted by telephone, in person, or by letter, and advised of the complaint. As with all persons interviewed, the licensee should be given the Tennessen Warning and information concerning the complaint-resolution process. The licensee should also be informed that he or she may have an attorney present during the interview.

Members of health-related licensing boards, except the Board of Veterinary Medicine, should also be familiar with the special requirements for investigations, information exchanges, and handling of complaints found in Minn. Stat. § 214.10, subd. 8.

### 3. Conferences

For many boards, the disciplinary conference is the complaint committee's chief vehicle for resolving complaints. A conference may be held for the purposes of investigating, negotiating, educating, or conciliating. The committee notifies the licensee of the conference by serving a notice of conference that identifies the conduct alleged to violate the board's governing laws and provides information about the process. Generally, a licensee receives the notice about 30 days before the conference, although this is not a statutory requirement. In emergency cases, the licensee may receive only a few days' notice.

Thorough conference preparation by the complaint committee members and the committee's counsel is essential to accomplishing the conference's purpose. Preparation should include reviewing the notice of conference, any investigative data, the licensee's response to the allegations, and all other written material relevant to the complaint. A licensee may be represented by an attorney at a disciplinary conference.

At the conference, the committee chair or the committee's attorney generally opens with a brief statement about procedural matters. A Tennessen Warning should be given before anyone asks the licensee questions. The committee then questions the licensee about the allegations in the notice of conference. In addition to the committee members, board staff sometimes ask questions. Questioning should be relevant to the complaint's subject matter and help committee members develop a full understanding of the licensee's position with respect to the allegations. This discussion should also allow the committee to assess the licensee's credibility and candor and the licensee's understanding of the relevant statutes and rules. Gathering this information permits the committee to decide how to proceed with the case. When highly technical issues are involved, the committee may hire an outside consultant to participate in the conference.

When the questioning is complete, the licensee is excused while the committee deliberates. The committee has a variety of options, including dismissing the complaint, continuing the matter to gather additional information, negotiating disciplinary action in a

stipulation and consent order, or recommending that the board take certain disciplinary action and that a contested case hearing be held to determine whether grounds exist for discipline.

Health-related licensing boards have the additional option of taking "corrective action." *Id.*§ 214.103, subd. 6. Corrective action is intended to be used when the committee identifies problems but the deficiency does not warrant disciplinary action or the evidence is insufficient to sustain disciplinary action. Corrective action is memorialized in a written agreement between the committee and the licensee, and the complaint is dismissed when the licensee completes the corrective action.

#### 4. Disciplinary action

As discussed above, disciplinary action, such as reprimands, civil penalties, suspensions, or license revocations, may be accomplished through a consent order or through a contested case. A consent order is issued after the full board reviews and approves a written stipulation setting forth facts and discipline to which both the complaint committee and the licensee have agreed. Contested cases are discussed more fully in section IV of this manual. While boards usually have discretion in whether to pursue discipline, that discretion is limited in some circumstances. For example, for persons convicted of certain crimes, the legislature requires boards to initiate contested case proceedings to suspend or revoke a license, or to refuse to renew a license. *Id.*§ 214.10, subd. 2(a).

Licensing boards also have the option of seeking an injunction from the district court. State law authorizes boards to seek injunctive relief for two purposes: to restrain any unauthorized practice or conduct and to prevent a threatened violation of any statute or rule that the board has authority to enforce. *Id.* § 214.11. If an injunction is granted, the board can still pursue a disciplinary action with respect to the person's license or application for license or renewal. Obtaining an injunction also does not preclude an appropriate criminal prosecution of the person who has been enjoined, and boards should refer all potential criminal violations to the appropriate criminal authorities.

Many boards have specific authority to issue cease and desist orders. This type of board order requires that certain conduct violating a board's rules or statutes stop. A cease and desist order must be served on the person whose conduct is the subject of the order. The order must also contain language providing an opportunity to request a hearing before an administrative law judge ("ALJ") concerning the allegations in the order. If a hearing is not requested within 30 days, the cease and desist order becomes final. A final cease and desist order is a public document under the MGDPA. A violation of a properly served, final cease and desist order may form the basis for a board to seek injunctive relief in district court.

### 5. Temporary suspensions

Some boards can use the remedy of temporary suspension. Temporary suspensions are reserved for cases in which a licensee's continued practice presents an immediate threat to the public. Each board with authority to temporarily suspend licenses may have slightly different procedures. In general, a board with this authority may temporarily suspend a license without a full trial-type hearing if it has probable cause to believe that the licensee violated a rule or statute that the board is empowered to enforce and that the licensee's continued practice would create a serious or imminent risk of harm to the public. The suspension specifies the rule or statute violated and is effective upon written notice to the licensee. The suspension remains in effect until the board issues a final order in the matter. When the board issues the suspension notice, it must commence a disciplinary hearing within a specified period, often 30 days.

#### a. *Petition to full board*

When the complaint committee decides that a case warrants a temporary suspension, the full board must be asked to take this action, usually by petitioning for temporary suspension.

**b.** ***Notice***

Because of the nature of temporary-suspension cases, the board generally acts quickly to consider the committee's petition. Efforts are made to provide the licensee reasonable notice of the time, date, and place of the meeting at which the board will consider the petition. The committee serves the licensee with a copy of the materials that the complaint committee will submit to the board, and informs the licensee of the opportunity to present argument and information to the board regarding the proposed temporary suspension. The licensee or the licensee's attorney is also informed that questions regarding procedures to be followed should be raised with the board's advising attorney.

**c.** ***Evidence***

Evidence presented by the parties in a temporary-suspension proceeding is usually in affidavit form only. The board typically does not hear testimony at the temporary-suspension hearing.

**d.** ***Board order***

Before the board meeting, the complaint committee submits a proposed order to the board and the licensee. After the meeting, the board must issue an order, either suspending or not suspending the licensee. If the board orders a suspension, it will schedule a contested case hearing within a specified period. After the contested case hearing, the ALJ typically will issue a report and recommendation within 30 days after the hearing record closes. Some boards' statutes require that the board issue a final order within 30 days after receiving the ALJ's report and any exceptions to it.

The emergency nature of temporary-suspension proceedings may require that one or more of the above procedures be dispensed with in an unusual case. In exceptional cases, an ex parte proceeding (one in which the licensee does not participate) could be held involving the temporary suspension of the licensee's license.

### 6. POST Board Complaint-Resolution Procedures

When the executive director or a board member of the POST Board receives a complaint that alleges a violation of the board's statutes or rules, the executive director and the chair of a three-member committee must select a law enforcement agency to investigate the complaint. *Id.*, subds. 10-13. The law enforcement agency has 30 days to investigate and submit a written report to the executive director. *Id.*, subd. 10.

Following the investigation, the executive director must schedule a meeting between the licensee who is the subject of the complaint and a three-member committee of the board to determine whether reasonable grounds exist to believe that the licensee violated a board statute or rule. At least two committee members must be peace officers. *Id.*, subd. 11.

At least 30 days before the meeting, the executive director must give the licensee and the complainant written notice of the meeting and give the licensee a copy of the complaint. At the meeting, both the licensee and the complainant must have a reasonable opportunity to be heard. *Id.* After considering the investigative report and the information provided by the licensee and the complainant, the committee, by majority vote, must take one of the following actions: (1) find reasonable grounds to believe that the licensee violated the board's rules and order an administrative hearing; (2) decide that no further action is warranted; or (3) continue the matter. The executive director must promptly notify the complainant and the licensee of the committee's action. *Id.*

If an administrative hearing is ordered, an ALJ makes a recommendation to the full board after the hearing and the board makes the final decision on the complaint. Before the board meets to consider the matter, however, the executive director must notify the licensee and the complainant of the meeting. After the board makes its decision, the executive director must notify the licensee, the complainant, and the chief law enforcement officer of the licensee's employer of the board's decision. *Id.*, subd. 12.

## IV. CONTESTED CASES

When a board committee believes that a licensing action is necessary and it cannot reach an agreement with the licensee or license applicant, a contested case proceeding is required. This involves a proceeding before an ALJ at the Office of Administrative Hearings, followed by the ALJ's recommendation to the board and the board's final decision. This section explains the contested-case process in more detail and the board's role in this process.

### A. Adjudicative Functions of the Board

Whenever a board reviews a particular individual or party's conduct, makes factual determinations, and issues an order with regard to the specific individual or party, the board acts in an adjudicative capacity, like a court. For example, when a licensee and a board's complaint committee cannot agree on the facts or the resolution of a licensing matter, a contested case becomes the method of resolving the disputes.

A contested case is a "proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." Minn. Stat. § 14.02, subd. 3. Put another way, a contested case is a type of proceeding in which the board makes specific factual and legal determinations regarding a specific party. Thus, it differs from a rulemaking proceeding in which the board exercises its legislative authority to establish general standards for future conduct by all licensees and future determinations by the board.

For licensing boards, contested case proceedings generally involve one of three situations:

a. The board denies a licensure application because the applicant does not meet qualification requirements or because the applicant's past conduct calls into question the applicant's ethical standards;

b. The board initiates a disciplinary hearing because of past or current conduct by an individual already licensed or registered by the board; or

c. The board initiates a disciplinary hearing because an individual not licensed by or registered with the board is engaging in, or has engaged in, an activity requiring licensure or registration.

A non-licensing board may be required to initiate a contested case if the board statute requires the process or if a constitutionally protected interest is involved. The following subsections describe the contested case process in the context of a licensing board.

### B. Steps in the Contested Case Process

A contested case proceeding involves a number of steps, beginning with either a decision by the board's complaint committee to initiate the contested case process or a request by an applicant for a hearing on the committee's recommended denial of a license application. The process potentially ends with review by an appellate court. The various steps in the process are briefly reviewed below.

#### 1. Initiating a hearing

If, after investigation, a board committee or representative believes that a licensee or applicant has engaged in conduct warranting board action or is otherwise unqualified for licensure, a contested-cased hearing may be initiated. *Id.* § 214.10, subd. 2. Boards should consult their board-specific statutes and rules regarding the hearing process for license applicants, as the process can vary between boards. A hearing is initiated when the board's executive director issues a notice and order for a hearing or a prehearing conference.

After initiating a contested case proceeding, an agency may, by order, provide that the ALJ's report or order will constitute the final decision in the case. *Id.* § 14.57(a).

#### 2. Agreement to arbitrate

As an alternative to initiating or continuing with a contested case proceeding, the parties, with agency approval, may enter a written agreement to submit the issues to arbitration by an ALJ. *Id.* § 14.57(b).

#### 3. The hearing

A contested case hearing is a formal proceeding similar to a trial by a judge without a jury. An ALJ appointed by the Office of Administrative Hearings presides over the hearing. Each ALJ is an attorney, independent from any state agency other than the Office of Administrative Hearings. In the hearing process, one party is the board's complaint or disciplinary committee,

represented by the Attorney General's Office. The licensee or license applicant is the other party. Each party has a right to present witnesses and documentary evidence, and to cross-examine any witnesses. The investigative file that the board's committee used in deciding whether to initiate the hearing does not become part of the hearing record unless it is introduced as evidence. After the hearing, the ALJ issues a report to the board consisting of findings of fact, conclusions, and a recommendation.

An evidentiary hearing is necessary only if adjudicative facts are disputed. If a board committee believes that the relevant facts are undisputed, it may bring a motion before the ALJ and ask the ALJ to make a recommendation based on those facts. The other party will then have an opportunity to argue either that the facts are disputed and a hearing is necessary, or that the law does not support an adverse action based on those facts.

**4. Board decision**

The ALJ's report, a recording or transcript of the hearing testimony, all documentary evidence, and the parties' written arguments are submitted to the board after the hearing. The ALJ's report is a recommendation to the board. Parties must have a minimum of ten days to file "exceptions" or objections to the ALJ report. Minn. Stat. § 14.61, subd. 1. While not required, a board may also allow non-adversely affected parties to file exceptions. *In re Residential Bldg. Contractor License of LeMaster Restoration, Inc.*, No. A10-1700, 2011 WL 2437463, at *6 (Minn. Ct. App. June 20, 2011). The contested case record must close upon either the filing of any exceptions to the ALJ report and presentation of argument or the expiration of the time allowed for submitting exceptions and arguments. The agency shall notify the parties and the presiding ALJ of the date when the hearing record is closed. *Id.* § 14.61, subd. 2.

After receiving the ALJ's report, the board must review the report and the hearing record. In most cases, each board member should review the ALJ report and the entire record. Reviewing the record also includes reviewing any exceptions submitted the parties. Failing to adequately review the record can lead to reversal on appeal. For example, the U.S. Supreme Court held that the decision-making process was defective when the head of an agency only

consulted with agency employees, did not review any evidence or briefs, and did not hear the oral arguments. *Morgan v. United States*, 298 U.S. 468, 481-82 (1936). In contrast, the Minnesota Supreme Court held that an agency head adequately reviewed the record before making a final decision when he thoroughly reviewed the record:

> [T]he commissioner made an informed decision, after adequate consideration of the voluminous evidence submitted at the hearing. He spent about ten hours personally studying the record. The commissioner reviewed the entire transcript "reading verbatim those areas of testimony which (he) felt were of substance or were in dispute," and examined every exhibit submitted at the hearing. In addition, he received a four-or-five-hour briefing from his staff, which consisted of a review of the evidence and the arguments made by the parties.

*Urban Council on Mobility v. Minn. Dep't of Nat. Res.*, 289 N.W.2d 729, 736 (Minn. 1980).

Each licensing board generally schedules a specific time following review of the record for the attorneys representing each party to present oral argument. The board is not bound by the ALJ's report and must make its own determination. Once the board determines the facts of the case and whether a person violated the board's statute or rules, it must decide what action, if any, to order. The board's decision and order must be in writing, be based on the record, and include findings of fact and conclusions of law on all material issues. Minn. Stat. § 14.62, subd. 1. If a decision or order rejects or modifies a finding of fact, conclusion, or recommendation contained in the ALJ's report, it must include the reasons for each rejection or modification. *Id.* Any modification or rejection of the report, however, must be based on evidence in the hearing record.

The board decision should be reached at a meeting following discussion by all board members eligible to vote on the matter. The decision should not be reached through meetings or telephone calls involving only two or three board members at a time. The board's advising attorney generally should be present. These board deliberations are typically conducted in a closed portion of an official board meeting. To avoid any appearance of impropriety, members of the discipline or complaint committee and any board staff involved in the case should not be present. *In re Application of Baker*, 907 N.W.2d 208, 213 (Minn. Ct. App. 2018) (holding that,

while committee and staff members' presence did not violate applicant's due process rights or evidence any bias, their presence could create appearance of impropriety that would thwart public's trust in the administration of justice).

**5. Timing for final board action**

The ALJ's report or order constitutes the final decision in the case unless the agency modifies or rejects within 90 days after the record of the proceedings closes. *Id.*, subd. 2a. Some boards may have a shorter statutory time limit in which to make a decision. When an agency fails to act within 90 days in a licensing case, the agency must return the record of the disciplinary proceeding to the ALJ for consideration of disciplinary action. *Id.*

In most circumstances, the board must issue its decision within 90 days after the record of the proceedings closes. If the board fails to announce the date that the record closes under Minn. Stat. § 14.61, subd. 2, the court may determine the date the record closed. *See In re Cich*, No. A08-0596, 2008 WL 4909757, at *2 (Minn. Ct. App. Nov. 18, 2008) (determining that record closed when parties filed additional memoranda for board's consideration as agreed during arguments before board).

A decision may be required in less than 90 days in some circumstances. For example, when there is a written request relating to zoning or other matters under Minn. Stat. § 15.99, the agency must affirm or deny the request within 60 days after the record closes, unless the agency grants itself an extension. Minn. Stat. § 15.99, subd. 3(f). If the agency fails to approve or deny the request within the 60-day period, the request will be approved regardless of the ALJ's recommendation. *See In re Hubbard ex rel. City of Lakeland*, No. A07-1932, 2008 WL 5136099, at *4 (Minn. Ct. App. Dec. 9, 2008), *aff'd on other grounds*, 778 N.W.2d 313 (Minn. 2010).

Similarly, an agency has 60 days after it determines that a business license application is complete to grant or deny the application. If the agency does not take action within that time, the application is deemed granted. Minn. Stat. § 15.992.

### 6. Public decision

A board order involving a licensee is public under the MGDPA regardless of whether the board takes disciplinary action. Minn. Stat. § 13.41, subd. 5. A licensing board may release confidential or nonpublic data collected as part of an active investigation for commencing a civil action only in narrow circumstances, such as if failure to do so is likely to create a clear and present danger to public health or safety. *Id.*, subd. 6; *see also id.* § 13.39, subds. 1, 2(a) (authorizing disclosure of data collected as part of active investigation if government entity determines access to data will aid law enforcement, promote public health or safety, or dispel widespread rumor or unrest). For example, when a board published a temporary suspension order that contained data otherwise classified as confidential under Minn. Stat. § 13.39, subds. 1, 2(a) on its website, the court held the board was permitted to publish the data to promote public health and safety. *Uckun v. Minn. State Bd. of Med. Practice*, 733 N.W.2d 778, 788 (Minn. Ct. App. 2007).

### 7. Judicial review

Board decisions are subject to judicial review when a licensee or applicant disagrees with a board's decision. Because the board decision represents the final action on behalf of the agency, a board committee cannot seek review of the decision if it disagrees with the outcome. Familiarity with how a court will review a board's factual and legal decisions will help board members understand the limits on their decision-making authority.

#### a. *Decisions based on the official record before the board*

A board or agency's decision can be challenged in an appeal to the Minnesota Court of Appeals on multiple grounds, including that it is arbitrary and capricious. Minn. Stat. § 14.69. "An agency's decision is arbitrary and capricious if it represents the agency's will and not its judgment." *In re Petition of N. States Power Gas Util.,* 519 N.W.2d 921, 924 (Minn. Ct. App. 1994). "Will" is the desire to achieve a certain result but without factual support. "Judgment" occurs when the board desires to achieve a certain result and has facts to support the conclusions. An agency ruling is arbitrary and capricious if:

> (a) an agency relied on factors not intended by the legislature; (b) it entirely failed to consider an important part of the problem; (c) it offered an explanation that is contrary to the evidence; or (d) the decision is so implausible that it cannot be explained as a difference in view or a result of the agency's expertise.

*Id.* at 924-25. Board members should therefore always base their decisions on the facts in the official record of the matter before them.

#### b. *Judicial deference to the board*

A reviewing court will usually give some weight to a board decision on technical issues within the board's area of expertise. For example, a board's decision that a machine does not meet the technical parameters set forth in board rules will usually receive deference. But a board's decision that a licensee did not properly deliver a document to the board will probably not. A court will likely apply more scrutiny to an issue that either falls outside an area of board expertise or is a legal question of procedure or statutory interpretation. Nevertheless, sometimes a reviewing court gives great weight to a board's long-standing interpretation of a statute or rule, especially if the legislature has not acted to overturn that interpretation.

### C. Committee and Advising Attorneys

Whenever the board's complaint or disciplinary committee decides to initiate a contested case or temporary-suspension proceeding, the committee presents and advocates a case supporting the committee's position on disciplinary action against the licensee. As an advocate, the attorney representing the committee may not advise the full board when it assumes its quasi-judicial role as the final decision-maker in a contested case. But the full board will need an attorney to advise it on legal issues that arise. The attorney advising the board at the decision stage of the contested case process must not have been involved in representing the committee in presenting the case before the ALJ. The Attorney General's Office has therefore created separate roles for attorneys advising boards and attorneys representing committees in contested cases.

When the attorney for the complaint or disciplinary committee identifies a good probability that the matter he or she is working on will proceed to a contested case hearing, an advising attorney is assigned for the full board unless a standing advisor has already been

assigned. Some boards have standing advising attorneys because of the boards' large volume of cases. Upon designating an advising attorney, all other division attorneys, as well as board staff, are informed of the assignment. The advising attorney is then isolated from the committee's advancement of the case.

Until the case goes to the board for a decision, the advising attorney does not review any of the case files and avoids discussing the matter with the attorney representing the committee or any individuals with knowledge of the case. Once the case is referred to the board, the advising attorney reviews the record. At that point, while the advising attorney may meet with the deliberating board members and discuss the case with them, the advising attorney continues to refrain from discussing any issue of law or fact raised by the case with any person who has been involved in the hearing or investigation, including the executive director, committee members, or board staff. The advising attorney may, however, discuss administrative and procedural matters with board staff. The advising attorney typically assists the board in drafting the decision and will provide the board with advice about any legal issues or other matters involved in the case. Once the board issues its decision, the advising attorney also advises the board in connection with any request for reconsideration, for a stay of the decision pending appeal, or for a waiver of bond.

**D. Disqualification of Board Members**

Some board members may be prohibited from participating in a decision in a contested case or in a temporary suspension of licensure under certain circumstances. For example, any board member who was consulted during an investigation may not deliberate or vote on any matter pertaining to the case when it goes before the board following a formal contested case proceeding. *See, e.g.*, Minn. Stat. §§ 214.10, subd. 2, 214.103, subd. 7. This prohibition applies to temporary suspensions, too. Members of the complaint committee, or board staff who were involved in investigating the complaint and pursuing the disciplinary action should not be present during the board's deliberation to avoid even the appearance of impropriety. *Baker*, 907 N.W.2d at 213.

A board member's personal familiarity with the person subject to the contested case should also be considered when deciding whether the member should be disqualified. Familiarity with the person who is the subject of the proceedings does not in itself disqualify a board member. As a general rule, a board member should disqualify himself or herself if the board member's familiarity with the person will affect the board member's ability to render a fair and impartial decision. With regard to health-related licensing boards, "a board member who has a direct, current or former financial connection or professional relationship to a person who is the subject of board disciplinary activities must not participate in board activities relating to that case." Minn. Stat. § 214.10, subd. 8(b). Note that this prohibition prevents participation in any board activities relating to a case in which the conflict is presented. Thus, the board member may not participate either on a complaint committee or as a board member in issuing a final decision. For further information regarding conflicts of interest, see section VII.E of this manual.

## V. THE ROLE OF BOARD MEMBERS IN HEARINGS

Boards make decisions that may significantly affect licensees or license applicants and their ability to make a living in their chosen professions. When exercising quasi-judicial authority, board members must therefore take their role seriously and hold themselves to high standards in deliberating and reaching decisions. This involves acting with a judicial demeanor, treating people fairly and consistently, and approaching each case objectively and with an open mind.

### A. Judicial Demeanor

A member of a state board acts in a quasi-judicial capacity when serving as the final decision-maker over a particular set of facts. It is important that board members act in a manner that generates respect from those who appear in front of them and instills confidence in the decision-making process.

Judges follow the code of judicial conduct and must be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, spectators, and staff. Members of a state board acting in a quasi-judicial capacity should demonstrate the same patience, dignity, and courtesy that a judge would. Remember that it is the advocate's job to make the best and most persuasive argument he or she can for the position desired. Although board members may disagree with the position advocated, they should not try to discourage the position by being discourteous, making belittling statements, or being excessively argumentative.

### B. Fairness and Consistency

A board member in a quasi-judicial role should treat, and be perceived as treating, all who appear in front of the board fairly and consistently. Consistency helps regulated individuals and the general public predict how the board will likely view a certain situation. But a board should not blindly follow its previous decisions on a particular topic. If the facts of a contested case materially differ from a previous case, the board does not always have to follow its prior decision. Consistency does not mean that a board cannot change its position or interpretation of a law, but a new interpretation of the board's statutes may have to be implemented through

rulemaking if the new position will be generally applicable to the public in the future. *See, e.g.*, *In re PERA Salary Determinations Affecting Retired & Active Emps. of City of Duluth*, 820 N.W.2d 563, 571 (Minn. Ct. App. 2012) (noting circumstances in which unpromulgated interpretive rule would be invalid).

### C. Objectivity

Board members acting in a quasi-judicial capacity must remain objective. As final decision-makers for the agency, board members must carefully listen to oral arguments and review the record, including any written exceptions and the ALJ's report, before voting on any matter before the board. This will help to ensure that the board makes decisions in an informed and impartial manner.

Objectivity or, at a minimum, the perception of objectivity is threatened by *ex parte* communications, which are communications between a decision-maker and only one party to a pending matter without the other party's knowledge or consent. For example, in the context of a disciplinary proceeding, decision-making board members must refrain from communicating about a case with members of the complaint committee unless the other party is also present. Further, although the Open Meeting Law does not apply to board deliberations in a contested case proceeding, adhering to some of its principles can preserve the integrity of the decision-making process and maximize the perception of objectivity. It is therefore a best practice to not discuss the matter currently before the board with anyone, even other members of the board, outside the forum for adjudication.

Finally, a board member should not participate as a decision-maker in any matter that implicates a conflict of interest or potential bias by the member. For more information about conflicts of interest see section VII.E.1 of this manual.

# VI. RULEMAKING

The authority of a board to adopt, amend, and repeal rules is one of the most important tools for refining and implementing the public policy that the legislature set for the state. This section of the manual is designed to familiarize board members with the concept of rulemaking and to provide practical information relating their role in rulemaking.

## A. Rulemaking Overview

Rulemaking is often described as a quasi-legislative function. It is the part of the administrative process by an executive branch agency that resembles a legislature's enactment of a statute. A "rule" is "every agency statement of *general applicability and future effect*, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by it or to govern its organization or procedure." Minn. Stat. § 14.02, subd. 4 (emphasis added).

Administrative rules are legally binding and have the force and effect of law within the state. Rules are typically directed to a particular group of people, and a board's rules regulate only those subject to its jurisdiction. As discussed in more detail below, a board generally cannot adopt rules until an ALJ has reviewed them for reasonableness, necessity, and legality.

## B. Statutory Authority

Under the Minnesota Constitution, the legislature has the power to establish the state's policy. But the legislature may delegate its lawmaking authority to agencies and boards to make more specific directives to implement that policy, so long as the legislature gives the agencies and boards reasonably clear standards to guide their actions. When a board adopts rules, it exercises the power that the legislature delegated to it. A board cannot adopt rules on a given subject matter unless a statute grants it rulemaking authority for that subject. Nor can a board adopt a rule that exceeds the scope of, or conflicts with, the authority granted by the legislature.

## C. Basic Rulemaking Procedures

Rulemaking is a lengthy and involved process. Drafting rules is only the first of many steps that must be followed before rules take effect. This section does not attempt to explain the

intricate procedures involved. Instead, it provides a general overview of rulemaking procedures. For a more in-depth analysis, the Office of the Revisor of Statutes has a detailed rulemaking guide online at *revisor.mn.gov/static/office/pubs/2018_all_rulemaking_guide.pdf*. Another helpful manual is available on the Minnesota Department of Health's website at *health.state.mn.us/data/rules/manual/docs/2018manual.pdf*.

The Minnesota Administrative Procedure Act ("APA") establishes two main procedures for adopting rules: (1) procedures applicable to *controversial* rules, Minn. Stat. §§ 14.131-.20; and (2) procedures applicable to *non-controversial* rules, Minn. Stat. §§ 14.22-.28. The APA also contains general requirements applicable to all rules, Minn. Stat. §§ 14.05-.128; a procedure for adopting rules under an exemption from rulemaking requirements for good cause, such as an immediate threat to public health or welfare, Minn. Stat. § 14.388; an expedited procedure to repeal obsolete rules, Minn. Stat. § 14.3895; and a more general expedited procedure that requires legislative authorization, Minn. Stat. § 14.389.

The primary difference between controversial and non-controversial rulemaking procedures is that controversial rules require a public hearing before an ALJ. A proposed rule is considered controversial if twenty-five or more people request a hearing on it. Interested persons who support or oppose the proposed rule may appear and testify at the hearing and submit written comments before, during, and after the hearing. The ALJ then recommends whether the board should adopt, modify, or withdraw the proposed rules. After considering the ALJ's recommendation, the board decides whether to adopt the proposed rule. If the board modifies any part of a proposed rule, it must return the adopted rule to the Chief ALJ, who then reviews the legality of the modification, including whether the modified rule is substantially different from the original proposed rule. *Id.* § 14.16, subd. 1. Non-controversial rules may be adopted without a hearing after a period for written comments by the public, but an ALJ must still approve these rules before they may be adopted. *Id.* § 14.26.

Excluding the time for drafting the rules, which may take many months, the series of steps involved in rulemaking typically require a minimum of six to nine months, depending on

whether the rules are controversial.[1] It is realistic to expect non-controversial rule procedures to take about nine months. Controversial rule procedures may take twelve months or longer because of the public hearing and additional review requirements involved.

### D. Major Rulemaking Responsibilities of Board Members

A board or agency cannot adopt rules unless it establishes that the proposed rules are both needed and reasonable. Proposed rules must be rationally related to a legitimate public purpose. *Mfd. Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 243 (Minn. 1984). Board members' first major responsibility is analyzing existing regulations, deciding the goals of the anticipated rulemaking, and then drafting the proposed rules. These can be difficult and time-consuming tasks. Rules must be drafted to accomplish the board's intent and be clear enough to be understood by the public and those administering the rules. Before even officially proposing rules, a board must also solicit and consider comments from the public about the subject of its possible rulemaking proposal. Minn. Stat. § 14.101, subd. 1.

Board members' next responsibility is to draft the statement of need and reasonableness (commonly called the "SONAR") for the proposed rules. The SONAR must address the following statutory factors: (1) who the proposed rule will affect, including both who will benefit and who will bear its costs; (2) the board's probable implementation and enforcement costs; (3) whether less costly or intrusive methods exist to achieve the proposed rule's purpose, including alternative methods that the board considered and the reasons the board rejected those alternatives; (4) an estimate of the probable costs to comply with the proposed rules; (5) the probable costs or consequences of not adopting the proposed rules; (6) a comparison of the proposed rules and any existing federal regulations; and (7) an assessment of the cumulative

[1] These steps include soliciting outside comment from affected persons before beginning the process; drafting rules and a statement of need and reasonableness; publishing and mailing various notices; receiving outside comment on the draft rules, including at a public hearing in some cases; and submitting the rules for review and approval by the Revisor of Statutes, the Governor's Office, and an ALJ at various stages and, in certain cases, the Chief ALJ and legislative bodies.

effect of the proposed rules with any other applicable regulation. *Id.* § 14.131. The board must also consult with Minnesota Management and Budget to evaluate the proposed rule's fiscal impact on, and the benefits to, local governments. *Id.*

The board must make the SONAR publicly available when it publishes notice of its intent to adopt rules without a hearing, or at least 30 days before the noticed hearing or. *Id.* §§ 14.131, .23. Even if an ALJ ultimately approves the rules, the governor may veto all or a severable portion of the rules and the legislature may also advise against adoption of a rule. *Id.* §§ 14.05, subd. 6, .126. Once adopted, rules generally remain effective until repealed or modified by the board in another rulemaking proceeding or declared invalid by an appellate court under Minn. Stat. §§ 14.44-.45. With some exceptions, if a board determines that the cost of complying with the proposed rules exceeds a certain threshold, the rules will not take effect with respect to certain small businesses and small cities until they are approved by a law enacted after the board adopts the rules. *Id.* § 14.127.

The elected governing body of any statutory or home-rule city, county, or sanitary district may petition a board to amend or repeal a rule in whole or in part. Within 30 days of receiving a petition, a board must reply in writing and state that the board either (a) intends to adopt the requested amendment or repeal; or (b) does not intend to and has requested that the Office of Administrative Hearings review the petition. *Id.* § 14.091. Any other person may also request adoption, amendment, or repeal of a rule, and the agency must respond within 60 days regarding its intentions. *Id.* § 14.09.

Even if the legislature exempts a board from following the general rulemaking provisions of the APA for a specific rule, the board must generally still follow certain procedures to have the force and effect of law. *See, e.g.*, *id.* §§ 14.386, .388. With certain important exceptions, rules adopted under these procedures are effective for only two years.

### E. Variances From Rules

A lawfully adopted rule is binding on all persons subject to the board's jurisdiction. To avoid unfair results, however, the legislature created a procedure that allows any person to petition the board for a variance from an adopted rule as it applies to that person.

A board *must* grant a variance if it finds that applying the rule to the petitioner's circumstances would not serve any of the rule's purposes. A board *may* grant a variance if it finds that: (1) applying the rule to the petitioner would result in hardship or injustice; (2) the variance would be consistent with the public interest; and (3) the variance would not prejudice any person or entity's substantial legal or economic rights. *Id.* §§ 14.055-.056. When granting a variance request, a board may attach conditions to the variance as necessary to protect public health, safety, or the environment. A variance may only have a prospective effect, and a board cannot grant a variance from a statute or court order. *Id.* § 14.055, subd. 2.

A board generally must issue a written order granting or denying a variance within 60 days after receiving the completed petition, unless the petitioner agrees to a later date. Failing to act on a petition within 60 days constitutes approval of the petition. Minn. Stat. § 14.056, subd. 5. A board must maintain for public inspection an index of its orders granting or denying variances. *Id.*, subd. 7.

## VII. SPECIAL STATUTES THAT AFFECT BOARDS

Boards, board members, and board staff are subject to a variety of laws that affect board operations and challenges to board conduct. Some of the key provisions are discussed below, such as those governing members' meeting attendance, when and how a board conducts business, how the board handles data, conflicts of interest and other ethical considerations, and the consequences for taking action without a substantially justified basis.

### A. Removal For Missing Meetings

A board member may be removed after missing three consecutive board meetings. Minn. Stat. §§ 15.0575, subd. 4, 15.059, subd. 4, 15A.0825, subd. 5, 214.09, subd. 4. A board chair must inform the board's appointing authority (generally the governor) if any board member misses three consecutive meetings. The board's secretary must provide written notice to a board member who misses two consecutive meetings that the member may be removed for missing the next meeting.

### B. Open Meeting Law

Board members must be conscious of when and where they conduct business. As discussed below, the Open Meeting Law generally requires that most board business be conducted in public.

#### 1. What is the Open Meeting Law?

The Open Meeting Law requires that, except as otherwise expressly provided by statute, all meetings, including executive sessions, of any state board, and of any committee or subcommittee of the board, be open to the public. Minn. Stat. ch. 13D. The Open Meeting Law does not apply to meetings at which a state board exercises quasi-judicial functions involving disciplinary proceedings, including complaint committee meetings. *Id.*, subd. 2. The purposes of the Open Meeting Law are to prohibit actions from being taken at secret meetings, to assure the public's right to be informed about board decisions, and to afford the public an opportunity to present its views to the board. *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch.*, 332 N.W.2d 1, 4 (Minn. 1983).

### 2. What constitutes a meeting?

The Open Meeting Law has been broadly construed in favor of the public. All gatherings of at least a quorum of a board, committee, or subcommittee at which members discuss, decide, or receive information as a group on issues related to a board's official business are "meetings" subject to the act. *Moberg v. Indep. Sch. Dist. No. 281*, 336 N.W.2d 510, 518 (Minn. 1983).

Although the Open Meeting Law does not apply to communications among less than quorum, discussion and persuasion among small groups of members may still be improper when designed to avoid public discussions, to forge a majority on an issue before public hearings, or to hide improper influences, such as a public official's personal or pecuniary interest. *Id.* at 517-18. Further, while purely social gatherings are not subject to the Open Meeting Law, a quorum of board members may not discuss or receive information on official business in any setting without complying with the open-meeting requirements. Even a short discussion by a quorum outside a meeting room constitutes a violation subjecting board members to monetary sanctions. For example, when a mayor and enough council members to constitute a quorum of a planning commission left a commission meeting for eight minutes to discuss a contract matter, Minnesota courts held that the mayor and council members violated the Open Meeting Law, were subject to monetary sanctions, and were not entitled to reimbursement from the city or its insurer for the cost of defending the lawsuit related to their violations. *Kroschel v. City of Afton*, 524 N.W.2d 719, 720-21 (Minn. 1994); *Kroschel v. City of Afton*, 512 N.W.2d 351, 356 (Minn. Ct. App. 1994); *Thuma v. Kroschel*, 506 N.W.2d 14, 19, 22 (Minn. Ct. App. 1993).

Informational seminars that include discussions about board business, attended by the whole board, must be publicized and open. Whether board members take official action or make decisions is irrelevant. If information is received and discussions are held that could foreseeably influence later decisions of the board, the Open Meeting Law applies. *St. Cloud Newspapers*, 332 N.W.2d at 1. But training sessions designed to improve trust, relationships, communications, and problem-solving among board members are not subject to the Open Meeting Law if the

board does not discuss, decide, or receive information relating to the board's official business. Minn. Dep't Admin., Advisory Op. No. 16-006 (Nov. 4, 2016).

The Open Meeting Law also applies to mail or other remote exchanges between a quorum of members about official business. Minn. Dep't of Admin., Adv. Op. No. 09-020 (Sept. 8, 2009) (holding board violated law by exchanging emails approving response to forthcoming newspaper editorial). One-way communication between a board chair or staff and members, however, is permissible so long as no discussion or decision-making ensues. As a result, board members should avoid engaging in e-mail and other exchanges involving a quorum of board members. A best practice is to not use "reply to all" when responding to an e-mail sent to more than one board member. Using social media does not violate the Open Meeting Law so long as a board member's social media use is limited to exchanges with all members of the general public. Minn. Stat. § 13D.065.

**3. Requirements at open meetings**

At open meetings, the votes of board, committee, or subcommittee members on any action taken must be recorded in a journal kept for that purpose. For appropriations, each member's vote must be recorded. The journal must be open to the public during all normal business hours. Minn. Stat. § 13D.01, subds. 4, 5.

In any open meeting, at least one copy of any printed materials relating to the agenda items of the meeting that are prepared, distributed, or available to board members must be available in the meeting room for the public to inspect while the board considers the subject matter of the materials. *Id.*, subd. 6. The public's copy must be identical to the board members' materials, and the public should be made aware that the materials are available. Minn. Dep't of Admin., Adv. Op. No. 18-003 (Apr. 5, 2018). The copy requirement does not apply to materials classified by law as not public by the Minnesota Government Data Practices Act or to materials relating to the agenda items of a meeting permitted to be closed. Minn. Stat. § 13D.01, subd. 6(b).

Although it is generally good practice to do so, the Open Meeting Law does not require: (1) that a board follow Roberts Rules of Order or other parliamentary procedures; (2) that the public be permitted to speak at the meeting; or (3) that meeting minutes be prepared (although the Official Records Act, Minn. Stat. § 15.17, separately requires public bodies to make and preserve all records necessary to full and accurate knowledge of its official activities). While not required by the Open Meeting Law, boards should be mindful to follow any additional meeting requirements the board may have adopted in its bylaws.

**4. Electronic meetings**

Board meetings subject to the Open Meeting Law may be conducted by telephone or electronic means as long as members participating in the meeting can hear each other and all discussion; members of the public at the board's regular meeting location can hear all discussion and votes; at least one board member is physically present at the regular meeting location; and all votes are conducted by a roll call. Minn. Stat. § 13D.015.[2].

If a telephone or other electronic mean is used to conduct a meeting, the board must, to the extent practical, allow a person to monitor the meeting electronically from a remote location. The board may, however, require the person to pay for any documented costs it incurs as a result. *Id.*, subd. 4. The board must also provide notice of the meeting location, of the fact that some members may participate electronically, and that the public is allowed to monitor the meeting electronically from a remote location. *Id.*, subd. 5. Additionally, the board must post notice of the meeting on its website at least 10 days before any regular meeting. *Id.*

Boards may also conduct meetings by interactive television ("ITV")—which includes Skype and similar applications—under rules similar to those for telephonic meetings, but board members and the public at the regular meeting location must be able to see and hear all discussion and votes. Further, each location where a board member is present through ITV must be open and accessible to the public, except when the board member is a member of the military

[2] Another law authorizes state boards and local governing bodies to conduct telephonic meetings with similar conditions, but applies only in circumstances involving a health pandemic or state of emergency declared under other statutory provisions. Minn. Stat. § 13D.021.

who is at a required drill or deployment, or on active duty and has not participated from an inaccessible location more than three times that year. *Id.* § 13D.02.

When a board conducts a meeting using ITV, the board's meeting notice must identify the location of the board members participating by ITV. *Id.*, subd. 4. The meeting minutes must also identify who appeared by ITV and the reason for doing so. *Id.*, subd. 6. So long as the requirements for ITV meetings are met, board members attending by ITV do not need to be within the territorial confines of the board's jurisdiction. Minn. Dep't of Admin., Adv. Op. No. 18-019 (Dec. 28, 2018).

**5. Public notice of meetings**

When a board meets, the Open Meeting Law requires notice to the public. The following sections address the notice required for different types of meetings.

**a. *Regular meetings***

A board must keep on file at its offices, or post on its website, a schedule of all regular meetings. Minn. Stat. § 13D.04, subd. 6(3). If a regular meeting is held at a time or place different from that stated in the schedule of regular meetings, the board must provide the same notice of the meeting that the board is required to provide for special meetings. *Id.*, subd. 1. Starting a meeting earlier than the noticed time or conducting a meeting without the proper notice violates the Open Meeting Law. *Merz v. Leitch*, 342 N.W.2d 141, 145-46 (Minn. 1984) (finding violation when board started meeting thirty minutes early). A board also cannot hold a meeting a location outside the territorial confines of the board's jurisdiction. *Quast v. Knutson*, 150 N.W.2d 199, 200 (Minn. 1967); Minn. Dep't of Admin., Adv. Op. No. 18-003 (Apr. 5, 2018).

**b. *Special meetings***

For special meetings, except emergency meetings or special meetings for which a separate statutory procedure governs notice, the board must post a written notice containing the date, time, place, and purpose of the meeting on the board's bulletin board (which must be accessible to the public) or on the door of its usual meeting room. Minn. Stat. § 13D.04, subd. 2(a); *Rupp v. Mayasich*, 533 N.W.2d 893, 895 (Minn. Ct. App. 1995). In stating the

meeting's purpose, the notice must adequately describe the topics that will be discussed. The board must then limit its discussion to the noticed topics. Minn. Dep't of Admin., Adv. Op. No. 19-006 (Apr. 9, 2019). The board must also mail or otherwise deliver notice to each person who has filed a written request for notice of special meetings. Minn. Stat. § 13D.04, subd. 2(b). Notices of special meetings must be posted, mailed, or delivered at least three days before the date of the meeting. *Id.* Instead of mailing or personally delivering notice of special meetings, a board may publish notice in the State Register or on the board's website at least three days before the meeting. *Id.*, subds. 2(c), 6(2). Presently the State Register is published each Monday (or Tuesday, if Monday is a holiday), and it generally requires that notices for publication be submitted by noon on the Tuesday before the publication date.

**c. *Emergency meetings***

An emergency meeting is a special meeting called under circumstances that, in the judgment of the board, require immediate consideration by the board. For emergency meetings, in addition to notifying all board members of the meeting, boards must make good-faith efforts to notify each news medium that filed a written request for such notice. *Id.*, subd. 3(a)-(c). The notice must include the subject of the meeting. *Id.*, subd. 3(d). Posted or published notice is not required. *Id.* If the board discusses or acts on matters not directly related to the emergency, the minutes of the emergency meeting must include a specific description of those matters. *Id.*, subd. 3(f).

**d. *Recessed meetings***

For recessed or continued meetings, no further published or mailed notice is necessary, provided that the time and place of reconvening the recessed or continued meeting was established during the previous meeting and recorded in the minutes of that meeting. *Id.*, subd. 4.

**e. *Committee meetings***

Board members who are not committee members may sometimes attend public committee meetings. When this occurs, care should be taken that a properly noticed committee meeting does not evolve into an unannounced meeting of the full board. If non-committee board

members participate in the committee's discussion, they could count toward a quorum of the entire board, and the meeting could be considered an unannounced meeting of the full board.

### 6. Relationship of the Open Meeting Law to other laws

The Open Meeting Law must sometimes be construed with other legislation, such as the MGDPA. Occasionally, a board needs to discuss data classified as not public at a meeting. In most circumstances, the board may not close the meeting to discuss the data. Such data may be discussed without liability or penalty if the disclosure relates to a matter within the board's authority and is reasonably necessary to address the item before the board at a required public meeting. Minn. Stat. § 13D.05, subd. 1(b).

### 7. Closed meetings

Closed meetings are subject to the same notice requirements as other meetings. The law specifies certain instances in which meetings must be closed to discuss nonpublic information and when meetings may be closed. Minn. Stat. § 13D.05. All closed meetings, except those closed due to attorney-client privilege, must be recorded and, unless otherwise provided by law, the recording must be preserved for at least three years. *Id.*, subd. 1(d). Also, before closing a meeting, the board must state on the record both the specific grounds for closing the meeting and the subject to be discussed. *Id.* § 13D.01, subd. 3.

#### a. *Required meeting closures*

Meetings must be closed when a board discusses the following:

1. Data that would identify alleged victims or reporters of criminal sexual conduct, domestic abuse, or mistreatment of minors or vulnerable adults;

2. Active investigative data or internal affairs data relating to allegations of law enforcement personnel misconduct collected or created by a state agency, statewide system, or political subdivision;

3. Educational data, health data, medical data, welfare data, or mental health data that are not public data under certain sections of the data practices law; or

4. An individual's medical records governed by Minn. Stat. §§ 144.291 to 144.298.

*Id.* § 13.05D, subd. 2(a).

In addition, a board must close one or more meetings for preliminary consideration of allegations or charges against an individual subject to its authority. But these meetings must be open at the request of the individual who is the subject of the meeting. *Id.*, subd. 2(b). If the board concludes that discipline of any nature may be warranted on those allegations, further meetings relating to those specific allegations must be open. *Id.*; Minn. Dep't of Admin., Adv. Op. No. 19-008 (May 22, 2019). As noted above, however, the Open Meeting Law, including this provision, does not apply to meetings at which a board exercises quasi-judicial disciplinary functions.

**b. *Discretionary meeting closures***

A board may close a meeting to evaluate the performance of an individual who is subject to its authority, but the meeting must be open at the request of the individual who is the subject of the meeting. Minn. Stat. § 13D.05, subd. 3(a). If the meeting is closed, the board shall identify the individual to be evaluated before closing a meeting. At its next open meeting, the board must summarize its conclusions regarding the evaluation..

A board may also close a meeting to review not-public property appraisals or other information related to pricing, offers, or counter-offers for purchasing or selling property. *Id.*, subd. 3(c). Before closing the meeting, the board must identify on the record the particular property at issue. The meeting must be recorded, and the recording must be preserved for eight years. Any final purchase or sale agreement must be approved at an open meeting. *Id.*

Meetings may also be closed under the attorney-client privilege. The nature of the attorney-client privilege in the context of the Open Meeting Law, however, is much narrower than the privilege recognized in the private sector, and it has evolved over time. Courts have held that a meeting may only be closed when a balancing test—which weighs the public's right to be informed against the policies served by the attorney-client privilege—dictates a need for absolute confidentiality. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 737-38 (Minn. 2002); *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435, 440 (Minn. Ct. App. 2005).

The privilege does not normally apply to ordinary legal advice, or to evaluating the potential for litigation in connection with a proposed action of the body. *Mader*, 642 N.W.2d at 738-42. In appropriate circumstances, however, the privilege may be invoked where specific litigation has been threatened but not actually commenced. *Dehen*, 693 N.W.2d at 440.

Before closing a meeting, the board must state on the record the specific grounds permitting closure and describe the subject to be discussed. Minn. Stat. § 13D.01, subd. 3. A mere statement that the meeting will be closed "under the attorney-client privilege to discuss pending litigation" is insufficient; a more detailed description is required. *Free Press v. Cty. of Blue Earth*, 677 N.W.2d 471, 475-77 (Minn. Ct. App. 2004). Rather, a more detailed description of the matter is required. *Id.* at 476-77.

**8. Penalties for violating the law**

Any person who intentionally violates the requirements of the Open Meeting Law, including the recording of votes, is subject to personal liability for a civil penalty of up to $300 for a single occurrence. Minn. Stat. § 13D.06, subd. 1. The board cannot pay the penalty on behalf of the person who violated the law. *Id.* A board may—but is not required to—pay costs, disbursements, or attorney fees incurred by or awarded against any board member. *Id.*, subd. 4(c); *see also Kroschel*, 524 N.W.2d at 721 (holding neither public body nor its insurer was required to pay litigation costs stemming from members' Open Meeting Law violations).

If a board member violates the Open Meeting Law relying on advice from counsel, it may still be considered an intentional violation if the reliance is unreasonable. *Brown v. Cannon Falls Township*, 723 N.W.2d 31, 44-46 (Minn. Ct. App. 2006). And a member can violate the Open Meeting Law by supporting an improper meeting even if the member does not attend. *Id.* at 48 (holding board member violated Open Meeting Law because he agreed to the board holding a noncomplying meeting, even though he ultimately did not attend for personal reasons).

If a person intentionally violates the Open Meeting Law in three or more separate actions connected with the same board, the person forfeits any further right to serve on the board, or in

any other capacity with the board, for a time equal to the term of office the person was then serving. Minn. Stat. § 13D.06, subd. 3(b); *see also Funk v. O'Connor*, 916 N.W.2d 319, 321-22 (Minn. 2018) (interpreting removal provisions). After finding the occurrence of a third violation, unrelated to the previous violations, the court will declare the position vacant and notify the appointing authority or clerk of the board. As soon as practical thereafter, the appointing authority shall fill the position. Minn. Stat. § 13D.06, subd. 3.

**9. Advisory opinions on Open Meeting Law issues**

An entity subject to the Open Meeting Law may ask the Commissioner of Administration for a written opinion on any question relating to the entity's duties under the Open Meeting Law. A person who disagrees with how a governing body performs its duties under the Open Meeting Law may also request an opinion. The government entity or person requesting this type of opinion must pay a $200 fee to the Commissioner of Administration. *Id.* § 13.072, subd. 1(b). The Department of Administration publishes its opinions and provides other resources on the Open Meeting Law on its website: *mn.gov/admin/data-practices/*.

Opinions issued by the Commissioner are not binding, but a court should give deference to an opinion. *Id.*, subd. 2. A board or board member who acts in conformity with a written opinion of the Commissioner is not liable for fines, attorney's fees, or any other penalty or subject to forfeiture of office under the Open Meeting Law. *Id.* Conversely, a court shall award attorney's fees in a lawsuit if a board was the subject of a previous Commissioner's opinion directly related to the litigation's subject matter and the board did not act in conformity with the opinion. *Id.* § 13D.06, subd. 4(e).

**C. Public Meetings Prohibited on Certain Days**

No state agency, board, commission, department, or committee shall conduct a public meeting on the day of the state primary or general election, or after 6:00 p.m. on the day of a major political party precinct caucus. *Id.* §§ 202A.19, subd. 6, 204C.03, subd. 4. Except in cases of necessity, public meetings may not be held on official state holidays listed in Minn. Stat. § 645.44, subd. 5.

### D. Minnesota Government Data Practices Act

The MGDPA, found in chapter 13 of the Minnesota Statutes, is a complex piece of legislation that has been frequently amended over the years. The MGDPA governs nearly every aspect of a government entity's collection, creation, storage, maintenance, or dissemination of information and provides for the recovery of civil damages, punitive damages, and attorney's fees for violating the law. *Id.* § 13.08, subd. 1. The MGDPA presumes that all government data collected, created, received, maintained, or disseminated by any state agency are public unless otherwise classified by a federal or state law or by the Commissioner of the Department of Administration through a temporary classification. *Id.* § 13.01, subd. 3.

The MGDPA has become an increasing source of litigation in recent years. Government entities have been held liable both for improperly releasing not public data and for refusing to release public data. *See, e.g.*, *Westrom v. Minn. Dep't of Labor & Indus.*, 686 N.W.2d 27 (Minn. 2004) (holding that agency improperly released civil investigative data to news organizations); *Navarre v. S. Wash. Cty. Sch.*, 652 N.W.2d 9 (Minn. 2002) (affirming $520,000 damages award for releasing information about complaints about teacher); *Wiegel v. City of St. Paul*, 639 N.W.2d 378 (Minn. 2002) (holding city liable for attorney's fees for failing to disclose interviewers' notes about applicants who failed civil service exams).

The MGDPA contains eleven distinct data classifications. Minn. Stat. § 13.02, subds. 3-5, 7, 8a-9, 12-15, 19 (defining "confidential data on individuals," "data not on individuals," "data on individuals," "government data," "not public data," "nonpublic data," "private data on individuals," "protected nonpublic data," "public data not on individuals," "public data on individuals," and "summary data"). In general terms, however, most data that boards handle will usually be *public* (i.e., available to everyone), *private* (i.e., available to the individual subject of the data, but not the public), or *confidential* (i.e., not available to the subject of the data or the public). But the same data may simultaneously have conflicting classifications. For example, depending on its purpose, the same data can be classified as public and confidential at the same time. *See Harlow v. Dep't of Human Servs.*, 883 N.W.2d 561, 568 (Minn. 2016) (observing that

MGDPA does not prohibit "anomalous" outcomes). The precise classification of any government data is determined by the law applicable to the data when a request for data is made. Minn. Stat. § 13.03, subd. 9; *see also KSTP-TV v. Metro. Council*, 884 N.W.2d 342, 349 (Minn. 2016) (holding that timing of data request determines classification). The correct legal analysis of issues concerning application of the MGDPA will always hinge on the specific facts presented.

**1. Duties of responsible authority and compliance official**

The "responsible authority" is the state official designated by law as the board's person responsible for collecting, using, and disseminating any data on individuals, government data, or summary data. Minn. Stat. § 13.02, subd. 16. The responsible authority must establish procedures to ensure that requests for data are received and responded to appropriately and promptly. *Id.* § 13.03, subd. 2; *see also Webster v Hennepin Cty.*, 910 N.W.2d 420, 431-33 (Minn. 2018) (affirming finding that county's data-practices procedures did not ensure county promptly and appropriately responded to data requests). The responsible authority must also prepare, and update as necessary, a written policy addressing the rights of data subjects and specific procedures for them to access public and private data. Minn. Stat. . § 13.025, subd. 3. The responsible authority must make the policy easily available to the public by distributing free copies to the public, posting it in a conspicuous place within the government entity, or publishing it on the government entity's website. *Id.*, subd. 4.

Each board's responsible authority must also prepare an annual inventory, which is a public document containing the agency's name, title and address, and a description of each category of record, file, or process the agency maintains containing private or confidential data. *Id.*, subd. 1. The responsible authority must further establish procedures to assure that data on individuals are accurate, complete, and current for the purposes for which the data were collected, and establish appropriate security safeguards for all records containing data on individuals. *Id.* § 13.05, subd. 5.

Each board must designate an employee to act as its data practices compliance official. *Id.*, subd. 13. People may direct questions or concerns regarding accessing data to the data

practices compliance official. The responsible authority may also be the data practices compliance official.

**2. Rights of the subject of data**

The MDGPA gives individuals specific rights. When collecting data from individuals and maintaining that data, boards must be mindful of these rights.

**a. *Rights individuals before collection: Tennessen warning***

Perhaps the most well-known individual right related to the MGDPA is the "Tennessen warning," which is named after Senator Robert Tennessen, the author of the Minnesota's original data privacy law. Analogous to a *Miranda* warning in criminal cases, a Tennessen warning must be given when a state board or agency asks an individual to supply private or confidential information concerning the individual. The government entity must inform the individual of: (a) the purpose and intended use of the requested data; (b) whether the individual may refuse or is legally required to supply the requested data; (c) any known consequence arising from providing or refusing to provide private or confidential data; and (d) the identity of other persons or entities authorized by state or federal law to receive the data. *Id.* § 13.04, subd. 2. A Tennessen warning is not required to be given in writing, but if given orally, it should be documented in the appropriate board file. Significantly, subject to limited exceptions, boards may not collect, store, use, or disseminate any private or confidential data on an individual for any other purposes than those stated to the individual when the data was collected. *Id.* § 13.05, subd. 4.

If an investigation is an attempt to gather factual information about an incident, and identifying a particular individual is only incidental to the focus of the inquiry, a Tennessen warning may not be required. But board staff should consult legal counsel before deciding not to give the warning.

**b. *Rights after collection***

Upon request, an individual must be informed whether he or she is the subject of stored data and whether the data are classified as public, private, or confidential. *Id.* § 13.04, subd. 3. An individual who is the subject of public or private data must further be shown the data without

any charge and, if requested, informed of its content and meaning. *Id.* If possible, the responsible authority must comply immediately with any request by the subject of the data, or within ten working days after the request if immediate compliance is not possible. *Id.* After showing the individual the data, the government entity need not disclose the data to the individual again for six months, unless an action is pending or additional data have been collected or created. *Id.*

An individual subject of data may contest its accuracy or completeness by submitting a written notice to the responsible authority that describes the nature of the disagreement. *Id.*, subd. 4(a). The responsible authority must then either correct any data found to be inaccurate or incomplete and notify past recipients of inaccurate or incomplete data, or notify the individual that the authority believes the data are correct. *Id.* Disputed data shall be disclosed to others only if the individual's statement of disagreement is included with the disclosed data. *Id.* The responsible authority's determination may be appealed as a contested case under the APA. *Id.*; *Schwanke v. Minn. Dep't of Admin.*, 851 N.W.2d 591, 593-95 (Minn. 2014) (holding that employee could contest accuracy of statements in employee evaluation that were capable of being verified as true or false). Data on individuals that have been successfully challenged by an individual must be completed, corrected, or destroyed by the board, depending on the nature of the inaccuracy. Minn. Stat. § 13.04, subd. 4(b).

**3. Rights of third persons to discover data**

The MGDPA authorizes the public to inspect and copy government data at reasonable times and places, and to be informed of the data's meaning. *Id.* § 13.03, subd. 3. Unless authorized by statute, a board cannot require a person to provide his or her identity or the reason for the data request. *Id.* § 13.05, subd. 12. A person may, however, be asked to provide identifying or clarifying information to facilitate access to data in which the requestor's identity affects access. For example, certain data are not public except to the subject of the data.

A board cannot charge a fee to inspect data. *Id.* § 13.03, subd. 3(a). Inspection includes visually inspecting paper and similar types of government data. It does not include printing copies unless that is the only method to permit inspection. *Id.* If a person requests copies or

electronic transmittal of the data to the person, the responsible authority must provide copies, but may require the requesting person to pay the actual costs of searching for and retrieving the data, including the cost of employee time and the costs of making, certifying, compiling, and transmitting the copies. *Id.*, subd. 3(c). Actual costs cannot be charged, however, if 100 or fewer pages of black and white, letter- or legal-size paper are requested. *Id.* Instead, the responsible authority may charge up to 25 cents per page. If copies cannot be provided when a request is made, the responsible authority shall provide them as soon as reasonably possible. *Id.*

If the responsible authority maintains public government data in a computer storage medium, the agency must provide, upon request, a copy of public data contained in that medium, in electronic form, if a copy can reasonably be made. Data, however, only have to be provided in the same electronic format or program used by the agency. *Id.*, subd. 3(e). If the government entity stores data in electronic form and makes the data available to the public on a remote-access basis, inspection includes remote access to the data by the public and the ability to print copies of, or download, the data on the public's own computer equipment. A government entity may charge a fee for remote access to data where either the data or the access is enhanced at the request of the person seeking access. *Id.*, subd. 3(b).

If the responsible authority denies access to data, he or she must inform the requester of the denial, either orally when the request is made or in writing as soon after the request as possible. *Id.*, subd. 3(f). The responsible authority must also cite the specific provision of state or federal law or the temporary classification that prohibits access to the data. Upon the request of any person denied access, the responsible authority must also certify in writing that the request has been denied and identify the legal basis for the denial. *Id.*.

**4. Disseminating data**

Private data may be used by, and disseminated to, any person or agency if the individual subject of the data has given informed consent. *Id.* § 13.05, subd. 4(d). "Informed consent" means "the data subject possesses and exercises sufficient mental capacity to make a decision which reflects an appreciation of the consequences of allowing the entity to initiate a new

purpose or use of the data in question." Minn. R. 1205.1400, subp. 3. Informed consent generally must be in writing, but implied consent may occur if specific steps are followed. *Id.*, subp. 4. In seeking informed consent, the responsible authority must explain the necessity for, or consequences of, the sought consent. The legislature nevertheless allows government entities, in consultation with appropriate law enforcement, emergency management, or other officials to share security information to "aid public health, promote public safety, or assist law enforcement." Minn. Stat. § 13.37, subd. 3(b).

A state board that collects, creates, receives, maintains, or disseminates private or confidential data on individuals is required to disclose any security breach of the data following discovery or notification of the breach. *Id.* § 13.055, subds. 1(a), 2(a). Notification must be made to the individual subjects of the data whose private or confidential data were, or are reasonably believed to have been, acquired by an unauthorized person. *Id.*, subd. 2(a). Notification must be within the most expedient time possible, consistent with the legitimate needs of a law enforcement agency and with any measures necessary to determine the scope of the breach and restore the reasonable security of the data. *Id.* Alternate methods of notification include first-class mail, electronic notice, and "substitute notice." *Id.*, subd. 4. Nationwide consumer reporting agencies must also be notified if the state board discovers circumstances requiring notification of more than 1,000 individuals at one time of a breach of the security of private or confidential data. *Id.* § 13.055, subd. 5.

**5. Licensing data**

Licensing data are data on individual applicants and licensees. Active investigative data collected by a licensing agency relating to complaints against an individual licensee are confidential. *Id.* § 13.41, subd. 4. Private data on individual licensees include the identities of complainants appearing in inactive investigative data who have made reports concerning licensees; the nature and content of unsubstantiated complaints; and inactive investigative data related to violations of statutes and rules. *Id.*, subd. 2. Public data on individual licensees typically include names, designated addresses, and license applications; orders for hearing;

findings of fact, conclusions of law, and specification of final disciplinary actions; the record of a disciplinary proceeding if a public hearing occurred; and settlement agreements between boards and individual licensees, along with the specific reasons for the agreement. *Id.*, subds. 2, 5.

Given the public nature of disciplinary proceedings against individual licensees, a board should include in its final order only factual findings that form the basis for disciplinary action. For example, in *Doe v. Minnesota State Board of Medical Examiners*, 435 N.W.2d 45 (Minn. 1989), the Board of Medical Examiners found that a doctor did not properly prescribe medications. The board's order, however, also discussed dismissed complaints related to sexual relations with former patients. The Minnesota Supreme Court held that, by including a detailed discussion of the dismissed charges and other information unrelated to its disciplinary action, the board exceeded the scope of what could properly be made public in its decision. The court further ordered the board to pay the doctor attorney's fees pursuant to Minn. Stat. § 13.08, subd. 4(a).

**6. Investigative data**

Investigative data are data collected by boards as part of an active investigation undertaken to commence or defend a pending civil legal action, or which are retained in anticipation of a pending civil legal action. *Id.* § 13.39, subd. 2. Investigative data are not public. A "pending civil legal action" includes judicial, administrative, or arbitration proceedings. *Id.*, subd. 1. A board may make investigative data accessible to any person, agency, or the public if the board determines that access will aid law enforcement, promote public health or safety, or dispel widespread rumor that poses a threat. *Id.*, subd. 2.

Similar to licensing data, investigative data generally become public when presented as evidence in court or made part of the court record. *Id.*, subd. 3. In contrast to inactive licensing data (which are private), inactive investigative data are public unless release would jeopardize another pending civil legal action. *Id.* Investigative data become inactive upon a decision not to pursue the civil action, expiration of the statute of limitations to file the civil action, or the exhaustion or expiration of any rights to appeal the civil action. *Id.*

A person denied access to not public data in a pending civil legal action may seek to compel production of the data through a motion to the presiding judicial officer or ALJ. *Id.* § 13.03, subd. 6. The judge must first decide whether the data are discoverable or releasable pursuant to the rules of evidence and of criminal, civil, or administrative procedure appropriate to the action. *Id*. If the data are discoverable, the judge must then decide "whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the agency maintaining the data, or of any person who has provided the data or who is the subject of the data, or to the privacy of an individual identified in the data." *Id.* In making this decision, the judge is required to consider whether notice to the subject of the data is warranted, and may fashion and issue any protective orders necessary to assure proper handling of the data by the parties. *Id.*

**7. Personnel data**

Personnel data are data on individuals maintained by a board because the individual is a current or former employee or applied for employment with the board. *Id.* § 13.43, subd. 1. Certain types of personnel data are public, such as an employee's name, salary, job title, and educational background. *Id.*, subd. 2. These data, however, are private with respect to employees of the board's contractors or subcontractors if the board maintains the data as the result of a contractual relationship entered into on or after August 1, 2012. *Id.* § 13.43, subd. 19. Most other types of personnel data are private, including the specific reasons and basis for complaints or charges against an employee (or applicant) until there has been a "final disposition of any disciplinary action." *Id.* §§ 13.43, subds. 2(a)(4)-(5), 4. During investigations, a board can disclose only the existence and status of complaints. *Navarre*, 652 N.W.2d at 22.

**8. Personal contact and online-account information**

Subject to limited exceptions, the following data on an individual collected, maintained, or received by a government entity for notification purposes or as part of a subscription list for an entity's electronic periodic publications as requested by the individual are private data on individuals: (1) telephone number; (2) e-mail address; and (3) Internet user name, password,

Internet protocol address, and any other similar data related to the individual's online account or access procedures. Minn. Stat. § 13.356.

### 9. Penalties for violating the MGDPA

A person who believes that that a board or board member violated the MGDPA may sue in district court or seek an administrative remedy at the Office of Administrative Hearings. Minn. Stat. §§ 13.08, .085. Violating the MGDPA may subject a board and its members to a variety of sanctions, ranging from monetary sanctions to criminal liability. The following sections outline these sanctions and underscore the importance of complying with the MGDPA.

#### a. *Board liability*

In district court actions, a board that violates any provision of the act is liable for damages caused by the violation, plus costs and reasonable attorney's fees. *Id.* § 13.08, subd. 1. In the case of a willful violation, the board is additionally liable for exemplary damages ranging from $1,000 to $15,000 for each violation. *Id.* A district court may also enjoin the board and its responsible authority to stop further MGDPA violations. *Id.* § 13.08, subd. 2. A board may further be subject to a civil penalty of up to $1,000 if an order to compel compliance with the MGDPA is issued against it. *Id.* § 13.08, subd. 4.

In MGDPA actions pursued at the Office of Administrative Hearings, an ALJ may impose a civil penalty of up to $300; issue an order compelling compliance; and refer the complaint to the appropriate prosecuting authority for consideration of criminal charges. *Id.* § 13.085, subd. 5(a). A rebuttable presumption also exists that the party who filed the complaint is entitled to reasonable attorney fees, up to $5,000. *Id.*, subd. 6. A party who seeks an administrative first is not precluded from bringing another action in district court alleging the same violation and seeking damages, although the ALJ's decision is not controlling in the later case. *Id.* § 13.085, subd. 5(e).

#### b. *Individual liability*

Any person—including a board member—who willfully violates the MGDPA or any rules adopted under it is guilty of a misdemeanor. *Id.* § 13.09(a). Willfully violating the MGDPA

constitutes just cause for suspending without pay or dismissing of the public employee. *Id.* § 13.09(b).

#### c. *Immunity*

A board or person releasing data pursuant to a presiding judicial officer's order is immune from civil and criminal liability for the data's release. *Id.* §§ 13.03, subd. 6, .08, subd. 5, .085, subd. 5(f).

### 10. Opinions by the Commissioner of Administration

A board may request an opinion from the Commissioner of the Department of Administration on any question relating to the MGDPA or other state statutes governing government data practices. *Id.* § 13.072, subd. 1. An individual who disagrees with a board's determination on data access may also request an opinion. Commissioner opinions are not binding on the government entity whose data is the subject of the opinion, but courts should defer to them in proceedings involving the data. *Id.*, subd. 2.

In determining whether to assess a penalty for an MGDPA violation, the court will consider whether the government entity acted in conformity with a written opinion of the Commissioner. *Id.* § 13.08, subd. 4(b)(5). A court may also award reasonable attorney's fees to a prevailing plaintiff who has brought an action in district court or the Office of Administrative Hearings if the government entity was the subject of a Commissioner's written opinion directly related to the cause of action being litigated and the government entity did not act in conformity with the opinion. *Id.* §§ 13.08, subd. 4(c), .085, subd. 6(b).

## E. Ethics in Government

Many state statutes address ethics in government, some of which apply to members and employees of state boards. The statutes that primarily affect boards are the statutes in Minn. Stat. ch. 10A (Ethics in Government Act) and Minn. Stat. § 43A.38 (Code of Ethics for Employees in the Executive Branch). If a conflict exists between chapter 10A and section 43A.38, chapter 10A controls. Minn. Stat. § 43A.38, subd. 8. The provisions of chapter 10A are enforced by the Campaign Finance and Public Disclosure Board ("CFPDB"), which regulates lobbying, conflicts

of interests, political committees, and campaign funding practices. The CFPDB is authorized to investigate any alleged or potential violations of the chapter and to determine whether probable cause exists to believe a violation has occurred. Minn. Stat. § 10A.022, subd. 3.

### 1. Conflicts of interest

Any public official who, in discharging official duties, would be required to take an action or make a decision that would substantially affect the official's financial interests or those of an associated business must follow specified procedures to disclose the potential conflict of interest. *Id.* § 10A.07, subd. 1(a). "Public official" includes any member, chief administrative officer, or deputy chief administrative officer of a state board that either has the power to adopt, amend or repeal rules, or has the power to adjudicate contested cases or appeals; managers of watershed districts; members of a watershed management district; and supervisors of soil and water conservation districts.[3] *Id.* § 10A.01, subd. 35. A financial interest includes any ownership or control of an asset that may potentially produce a monetary return. *Id.* § 10A.07, subd. 1(b). The disclosure procedures are not required when the effect on the official is no greater than on other members of the public official's business classification, profession, or occupation. *Id.*, subd. 1(a).

When faced with a potential conflict of interest, the public official must give notice and not participate in the action giving rise to the potential conflict of interest. *Id.* §§ 10A.07, subds. 1-2, 43A.38, subd. 7. Notice is given by completing a conflict-of-interest form and delivering copies of the form to the CFPDB and to the official's immediate superior. If insufficient time exists to file the notice in advance, then the public official must orally inform

[3] Certain boards, such as the Council on Asian-Pacific Minnesotans, the Council for Minnesotans of African Heritage, the State Council on Disabilities, the Law Examiners Board, the Ombudsperson for Families, the Ombudsperson for Mental Health and Developmental Disabilities, and the Minnesota Council on Latino Affairs, do not have the power to adopt, amend, or repeal rules or the power to adjudicate contested cases or appeals. Members or administrative officers of these boards are therefore not public officials subject to the requirements of chapter 10A. But all executive-branch employees are subject to the requirements of Minn. Stat. § 43A.38. Questions regarding whether an individual is an employee in the executive branch can be directed to your board's counsel.

the superior and file the required written notice within one week of learning of the potential conflict.

A public official who has a potential conflict of interest should remove himself from the conflict. In the case of a decision made by a state board, a member cannot "chair a meeting, participate in any vote, or offer any motion or discussion on the matter giving rise to the potential conflict of interest." *Id.* § 10A.07, subd. 2(b). The question arises whether abstention is sufficient without complying with the notice provision. In 1987, the Minnesota Supreme Court implied that both steps were required of a public utilities commissioner faced with a conflict of interest. *In re Petition of N. States Power Co.*, 414 N.W.2d 383, 386 (Minn. 1987).

Upon request of an individual, the CFPDB is authorized to publish advisory opinions on the requirements of chapter 10A. The individual may, in good faith, rely on an advisory opinion response. Minn. Stat. § 10A.02, subd. 12(b). A written advisory opinion from the CFPDB binds the CFPDB in any later proceeding it brings against the person who requested the opinion or whose conduct the opinion addressed, unless the opinion has been amended or revoked or the opinion requester omitted or misstated material facts. *Id.* If the CFPDB intends to apply new principles of law or policy from the opinion more broadly, the CFPDB must adopt rules. *Id.*, subd. 12a. Nevertheless, the CFPDB's advisory opinions are useful guides to boards with questions regarding chapter 10A. The opinions are available on the CFPDB's website: *cfb.mn.gov*.

Substantially similar conflict-of-interest provisions apply to all employees in the executive branch under Minn. Stat. § 43A.38.[4] If an executive-branch employee is faced with a potential conflict of interest, it is the employee's duty to avoid the situation. *Id.*, subd. 6. If the employee or the appointing authority determines that a conflict exists, the matter must be assigned to another employee if possible. *Id.*, subd. 7. If reassignment is not possible, interested

[4] The Minnesota Historical Society is not considered part of the executive branch for purposes of section 43A.38. Minn. Stat. § 43A.02, subd. 22.

persons must be notified of the conflict. *Id.* The statute enumerates several situations that are deemed to be conflicts of interest. *Id.*, subd. 6.

Members of health-related licensing boards also have a specific conflict-of-interest provision that expressly prohibits them from participating in a case if the member has a direct current or former financial connection or professional relationship to the subject of a disciplinary action. Minn. Stat. § 214.10, subd. 8(b). The Agricultural Chemical Compensation Board similarly has a board-specific conflict-of-interest rule. Minn. R. 1512.0500. If a board member has a direct or indirect financial or employment interest relating to a matter before the board that is likely to affect the member's impartiality, that member must make the interest known and refrain from participating in or voting on the matter. *Id.* The abstention of a board member or members does not prevent the remaining members from conducting a legal vote. *Id.*

**2. Statements of economic interest**

Public officials are required to file statements of economic interest. Minn. Stat. § 10A.09. A public official must file a statement of economic interest with the CFPDB within 60 days of the effective date of appointment. *Id.*, subd. 1(1). The statement is made on a form prescribed by the CFPDB that calls for the following information: name, address, occupation, and principal place of business; the name of each associated business[5] and the nature of that association; a listing of all real property within the state, excluding homestead property, in which the individual holds an interest valued in excess of $2,500 or an option to buy property worth $50,000 or more; a listing of all securities in which the official's share has a market value of more than $10,000; a listing of all real property in the state in which the member's partnership holds a value in excess of $2,500 or an option to purchase property worth $50,000 or more; and a listing of any investments and property interests held by the official or an immediate family member in the United States or Canada connected with pari-mutuel horse racing. *Id.*, subd. 5. The CFPDB has

[5] "Associated business" means any association in connection with which the individual is compensated in excess of $250 except for actual and reasonable expenses in any month as a director, officer, owner, member, partner, employer or employee, or holds securities worth $10,000 or more at fair market value. Minn. Stat. § 10A.01, subd. 5.

interpreted this statute to require reporting of all investments, including shares of stock and mutual funds.

Each individual required to file a statement of economic interest must file a supplementary statement by the last Monday in January of each year that he or she remains in office, if information on the most recently filed statement has changed. *Id.*, subd. 6. If a supplementary statement is required, it shall include the amount of each honorarium in excess of $50 received since the previous statement, together with the name and address of the source of the honorarium. *Id.*

**3. Gifts**

State law prohibits public officials from accepting gifts from lobbyists or their employers, with minor exceptions. *Id.* § 10A.071. Most professional associations are lobbyists, or employers of lobbyists, for these purposes. A gift is defined as "money, real or personal property, a service, a loan, a forbearance or forgiveness of indebtedness, or a promise of future employment, that is given and received without the giver receiving consideration of equal or greater value in return." *Id.*, subd. 1(b). This broad rule includes entertainment, loans of personal property for less than payment of fair market value, preferential treatment for purchases or honoraria, and food or beverages provided at a meeting, unless the public official is appearing to make a speech or answer questions as part of a program.[6]

Again, Minn. Stat. § 43A.38 has substantially similar provisions prohibiting all executive branch employees from accepting any payment of expense, compensation, gift, reward, gratuity, favor, service or promise of future employment or other future benefit from *any source,* except the state, for any activity related to the duties of the employee unless otherwise provided by law. *Id.* § 43A.38, subd. 2. Specific exceptions to the prohibition are enumerated in the statute. *Id.* There is also a prohibition on gifts related to state contracts. *Id.* § 15.43, subd. 1.

[6] Some exceptions to the gift prohibition include services to assist an official in the performance of official duties; services of insignificant monetary value; a plaque or similar memento recognizing individual services in a field of specialty or to a charitable cause; a trinket or memento of insignificant value; and informational material of unexceptional value. Minn. Stat. § 10A.071, subd. 3.

#### 4. Lobbyist registration

Lobbyists must register with the CFPDB. *Id.* § 10A.03. A lobbyist is defined by Minn. Stat. § 10A.01, subd. 21, and does not include state employees or "public officials." Therefore, in general, members and employees of state boards appearing before the legislature in connection with board business are not considered lobbyists under the statute and need not register with the CFPDB. But if a state board member appears before the legislature under other circumstances, registration as a lobbyist may be required by section 10A.03.

#### 5. Use of state time, resources, and information

Board members and board staff will inevitably have access to certain data and resources through their roles. As outlined below, board members and staff must not use board information and resources for personal reasons.

##### a. *Confidential information*

An executive branch employee cannot use confidential information to further the employee's private interest or accept outside employment or involvement in a business or activity that will require the employee to disclose or use confidential information. Minn. Stat. § 43A.38, subd. 3.

##### b. *Property, time, and supplies*

Except as provided by law, a state employee cannot use or allow the use of state time, supplies, property, or equipment for the employee's private interests or any other use not in the state's interest. *Id.*, subd. 4. This includes using state stationery, postage, telephones, WATTS lines, electronic mail, fax machines, and photocopying equipment. The fact that the non-state use does not increase the cost to the state is not an exception to the rule, nor is prompt reimbursement of any costs that may be inadvertently incurred.

One small exception to this general rule exists for electronic communication (i.e., electronic mail). Executive branch employees may use state time, property, or equipment to communicate electronically with other persons provided that the use, including the value of the

time spent, results in no incremental cost to the state or results in an incremental cost that is so small as to make accounting for it unreasonable or administratively impracticable. *Id.*, subd. 4(b).

**6. Political activity**

The Fair Campaign Practices Act provides that a state employee or official may not use official authority or influence to compel a person to apply for membership in or become a member of a political organization, to pay or promise to pay a political contribution, or to take part in political activity. *Id.* § 211B.09. Using an official position to influence political activity is also prohibited by Minn. Stat. § 43A.32, subd. 1.

**7. Gubernatorial appointees**

Past governors have issued executive orders that establish a code of ethics for the governor's appointees. The past orders have strongly paralleled the code of ethics for executive-branch employees in the areas of conflicts of interest, gifts, use of state time, resources and information, and political activity. In the past, some executive orders have contained stricter provisions.

The provisions discussed above establish ethical principles to preserve public confidence in the integrity of government officials. The intent is to eliminate any potential conflicts of interest, the appearance of impropriety, or influence in government. All board members are encouraged to be cognizant of these prohibitions.

**F. The Equal Access to Justice Act**

The Minnesota Equal Access to Justice Act ("MEAJA"), Minn. Stat. §§ 15.471-.474, was enacted in 1986. MEAJA's key provision states:

> If a prevailing party other than the state, in a civil action or contested case proceeding other than a tort action, brought by or against the state, shows that the position of the state was not substantially justified, the court or administrative law judge shall award fees and other expenses to the party unless special circumstances make an award unjust.

Minn. Stat. § 15.472(a). "Party" means a person named or admitted as a party in a court action or contested case proceeding, who is a small business, including a partner, officer, shareholder member or owner. *Id.* § 15.471, subd. 6. "State" means "the state of Minnesota or an agency or

official of the state acting in an official capacity." *Id.*, subd. 7. "Fees" includes attorney's fees based on prevailing market rates. *Id.*, subd. 5. "Substantially justified" means "the state's position had a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation or contested case proceeding." *Id.*, subd. 8. That a party prevailed on the merits in an action against the agency does not automatically mean that the agency's position was not "substantially justified." *Donovan Contracting v. Minn. Dep't of Transp.*, 469 N.W.2d 718, 720-21 (Minn. Ct. App. 1991).

Recoverable "expenses" includes filing fees, subpoena fees and mileage, transcript costs and court reporter fees, expert witness fees, photocopying and printing costs, postage and delivery costs, and service of process fees. Minn. Stat. § 15.471, subd. 4. It also includes the reasonable cost of any "study, analysis, engineering report, test or project" incurred by a party in the litigation. *Id.*

There is some question whether this statute applies in licensing proceedings because the law focuses on small businesses and a license is typically held in a person's individual capacity. Licensees could, however, argue that it applies. Thus, if a complaint committee brings a disciplinary case and does not prevail, the licensee may bring an action under MEAJA for costs and attorney's fees. To succeed, however, the licensee must demonstrate that the complaint committee's position had no reasonable basis in law and fact and that the licensee is a "party" as defined by MEAJA.

## VIII. LITIGATION ARISING FROM BOARD ACTION: COMMON CLAIMS AND DEFENSES

In addition to facing liability for violating the MGDPA or bringing an action that was not substantially justified under MEAJA, boards may be sued under other causes of actions as a result of their work. This section outlines boards' general responsibilities related to litigation, some of the most common types of claims brought against boards, and some of the common defenses to those claims.

### A. Litigation Holds

Federal and state discovery rules obligate organizations to preserve documents and other information relevant to potential or pending litigation. If there is potential or pending litigation involving a board, the Attorney General's Office may send a litigation-hold notice reminding the board of its ongoing duty to preserve all documents and electronically-stored information that may be relevant to the litigation. It is the board's responsibility to implement the litigation hold and ensure that individuals with relevant information preserve it throughout the course of any litigation. A board's failure to implement a litigation hold and ensure the continued preservation of all relevant information while litigation is pending or reasonably anticipated may result in the imposition of severe sanctions against the board. Possible sanctions may include monetary penalties and exclusion of evidence.

### B. Tort Claims: Liability Under Minnesota Statutes and Common Law

A "tort" is a non-contractual civil wrong that is generally defined as the violation of a duty of care owed to a party that results in damage to property, personal injury, or death. A board member's liability for tortious acts is controlled by the Torts Claim Act, Minn. Stat. §§ 3.732-.756. The key provision is section 3.736, subdivision 1, which provides:

> The state will pay compensation for injury to or loss of property or personal injury or death caused by an act or omission of an employee of the state while acting within the scope of office or employment . . . and who is acting in good faith . . .

> under circumstances where the state, if a private person, would be liable to the claimant, whether arising out of a governmental or proprietary function. Nothing in this section waives the defense of judicial, quasi-judicial or legislative immunity except to the extent provided in subdivision 8.

For purposes of section 3.736, "state" includes all departments, boards, agencies, commissions, courts, and officers in the executive, legislative, and judicial branches of the State of Minnesota. Minn. Stat. § 3.732, subd. 1(1). An "employee of the state" includes all present or former officers, members, directors, or employees of the state. *Id.* § 3.732, subd. 1(2). Under these definitions, state boards are the "state" and their members and employees are "employees of the state" for purposes of the Tort Claims Act. Rulings of personal liability against board members, however, are rare.

#### 1. Statutory exclusions from liability

The Tort Claims Act contains several exclusions so that boards and board members are immune from tort liability for several kinds of conduct. The following exclusions apply to the activities of state boards: good-faith immunity; discretionary immunity; and, when applicable, licensing immunity. Minn. Stat. § 3.736, subd. 3.

##### a. *Good-faith immunity*

Good-faith immunity provides immunity for "a loss caused by an act or omission of a state employee exercising due care in the execution of a valid or invalid statute or rule." Minn. Stat. § 3.736, subd. 3(a). Good-faith immunity applies when, as a matter of law, a state employee has a duty to act and exercises due care in executing that duty. *Johnson v. Dirkswager*, 315 N.W.2d 215, 223 (Minn. 1982).

##### b. *Statutory discretionary immunity*

Statutory discretionary immunity provides immunity for "a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused." Minn. Stat. § 3.736, subd. 3(b). The doctrine of statutory discretionary immunity recognizes that the courts, through the vehicle of a negligence action, are not an appropriate forum to review and

second-guess government acts that involve exercising judgment or discretion. *Cairl v. State*, 323 N.W.2d 20, 24 (Minn. 1982).

In determining whether statutory discretionary immunity shields the state and its employees, courts distinguish between "planning" and "operational" decisions. *Holmquist v. State*, 425 N.W.2d 230, 232 (Minn. 1988); *Hansen v. City of St. Paul*, 214 N.W.2d 346, 350 (Minn. 1974). Discretionary immunity protects planning-level decisions. *Larson v. Ind. Sch. Dist. No. 314*, *Braham*, 289 N.W.2d 112, 120 (Minn. 1979). "Planning level decisions are those involving questions of public policy, that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy . . . . Sometimes the implementation of a policy itself requires policy-making." *Holmquist*, 425 N.W.2d at 232, 234. In contrast, operational-level decisions include scientific or professional decisions that do not involve balancing policy with political, economic, and social considerations. *Nusbaum v. Blue Earth Cty.*, 422 N.W.2d 713, 720 (Minn. 1988).

Some conduct may necessarily implicate both planning and operational decisions. For example, in response to misconduct allegations, the Minnesota Court of Appeals stated:

> Determinations [of] appropriate action to take under these circumstances were necessarily beset with policy-making considerations. For example, management needed to consider the importance of maintaining a workplace free of sexual harassment and the importance of deterring future misconduct. But while considering these policies, management may also have weighed competing policies, such as avoiding unnecessary disruption of the workplace and imposing discipline for alleged harassment only upon the establishment of substantial cause, both for the sake of staff and for protection from expense associated with proceedings premised on a claim of wrongful discipline. . . .
>
> [I]nvestigation and disciplinary decisions involved the type of legislative or executive policy decisions that we believe must be protected by discretionary immunity. The center's decisions did not simply require the application of professional judgment to a given set of facts, but were necessarily entwined in a layer of policy-making that exceeded the mere application of rules to facts.

*Oslin v. State*, 543 N.W.2d 408, 416 (Minn. Ct. App. 1996).

Other more specific statutes may affect the availability of discretionary immunity. For example, statutory discretionary immunity does not apply to whistleblower claims against boards. *See Janklow v. Minn. Bd. of Exam'rs for Nursing Home Adm'rs*, 552 N.W.2d 711, 716-18 (Minn. 1996) (holding that the Whistleblower Act operates as an implied waiver of the statutory immunity); *Carter v. Peace Officers Standards & Training Bd.*, 558 N.W.2d 267, 269 (Minn. Ct. App. 1997) (concluding that statutory immunity was not available as defense to whistleblower claim).

**c. *Licensing immunity***

Licensing immunity provides immunity for "a loss based on the failure of a person to meet the standards needed for a license, permit, or other authorization issued by the state or its agents." Minn. Stat. § 3.736, subd. 3(k). Licensing immunity is not limited to actions taken with respect to issuing a license. The law also immunizes the state and its employees against allegations arising from its other licensing activities, including inspections, evaluations, supervision, and related functions. *See Andrade v. Ellefson*, 391 N.W.2d 836, 837 (Minn. 1986) (holding that county was immune from liability for claims of negligent licensing, inspection, and supervision); *Gertken v. State*, 493 N.W.2d 290, 292-93 (Minn. Ct. App. 1992) (holding that state was immune from liability for claims of negligent advice related to licensing standards during licensing inspection). In short, immunity applies if the actions in question were directly related to the scope of the subject matter considered or involved in the issuance of the license. *Id.* at 292.

In addition to those immunities provided by the Tort Claims Act, a second source of statutory immunity provided by the legislature to protect boards and their members is found each board's governing statutes. For example, Minn. Stat. § 147.121, subd. 2, provides immunity from civil liability and criminal prosecution for members of the Board of Medical Practice and employees and consultants retained by the board for actions taken relating to their duties under the practice act.

### 2. Common law exclusions from liability

In addition to statutorily afforded immunity for tort actions, certain common law immunities further protect board members against claims of allegedly tortious conduct. The most common forms of immunities for board members are discussed below.

#### a. *Official immunity*

Official immunity protects from personal liability a public official charged by law with duties that call for exercising judgment or discretion, unless the official is guilty of a willful or malicious wrong. *Rico v. State*, 472 N.W.2d 100, 106-07 (Minn. 1991); *Elwood v. Cty. of Rice*, 423 N.W.2d 671, 677 (Minn. 1988). Although the discretionary immunity afforded under the Tort Claims Act and the common law doctrine of official immunity both protect discretionary acts, "discretion" has a broader meaning in the context of official immunity. "Official immunity involves the kind of discretion which is exercised on an operational rather than a policymaking level, and it requires something more than the performance of 'ministerial duties.'" *Pletan v. Gaines*, 494 N.W.2d 38, 40 (Minn. 1992). Official immunity is not granted for ministerial duties. *Ireland v. Crow's Nest Yachts, Inc.*, 552 N.W.2d 269, 272 (Minn. Ct. App. 1996). Ministerial duties are duties "in which nothing is left to discretion . . . a simple, definite duty arising under and because of stated conditions and imposed by law." *Cook v. Trovatten*, 274 N.W. 165, 167 (Minn. 1937).

The discretionary immunity provided by the Tort Claims Act is designed primarily to protect the separation of powers by insulating executive and legislative policy decisions from judicial review through tort actions. Official immunity, however, is "intended to insure that the threat of potential personal liability does not unduly inhibit the exercise of discretion required by public officials in the discharge of their duties." *Rico*, 472 N.W.2d at 107; *Holmquist v. State*, 425 N.W.2d at 233 n.1. While official immunity ordinarily applies to the decisions of individuals, it also applies to policies adopted by a committee. *See Anderson v. Anoka Hennepin*

*Indep. Sch. Dist*., 678 N.W.2d 651 (Minn. 2004) (addressing policy adopted by committee of shop leaders on using table saws).

**b. *Vicarious official immunity***

The doctrine of official immunity can be extended to protect the government employer from liability for its employees' acts. In this regard, the Minnesota Supreme Court has recognized the doctrine of vicarious official immunity to avoid defeating the purpose of official immunity when a claimant sues the governmental employer based on its employee's alleged negligence. *Pletan*, 494 N.W.2d at 42. Whether to extend official immunity to the government employer is a policy question. *Ireland*, 552 N.W.2d at 272. In determining whether official immunity extends to the employer, "[t]he relevant inquiry is whether, if no immunity were granted, the public employee would think that his performance was being evaluated so as to 'chill' the exercise of his independent judgment." *Id.*

**c. *Quasi-judicial immunity***

"[J]udicial immunity is an immunity from suit, not just from ultimate assessment of damages." *Mireles v. Waco*, 502 U.S. 9, 11 (1991). The only two circumstances in which judicial immunity is unavailable are: (1) when a judge's action is not taken in the judge's judicial capacity; and (2) when a judge's action is taken in the complete absence of all jurisdiction. *Id.* But for these two narrow exceptions, judicial immunity completely protects a judge from suit based on judicial decision-making.

Licensing boards act in a quasi-judicial capacity when making decisions involving the imposition of remedial sanctions against a licensee. When performing this function, there is a strong argument that licensing boards and their members are entitled to quasi-judicial immunity. This immunity is the functional equivalent of judicial immunity and it would provide complete protection for a board and its members.

### 3. Punitive damages

As a general rule, punitive damages may not be assessed against a governmental entity absent statutory authority. *See generally* 1 Am. Law Reports 4th 448, 453. Minnesota's Tort Claims Act expressly provides, "The state will not pay punitive damages." Minn. Stat. § 3.736, subd. 3. The Attorney General's Office has argued in certain court cases that because punitive damages are typically awarded to punish a guilty party for the benefit of society, recovering punitive damages from the government would contravene public policy in that innocent taxpayers would be forced to pay the damages.

While it is clear that the state cannot be forced to pay punitive damages for tort claims, because there have been no court decisions on the point, it is less clear whether this prohibition applies to punitive damages awarded against individual employees.

### 4. Liability limits

The total liability dollar cap of the state and its employees acting within the scope of their employment on any tort claim shall not exceed $500,000 per individual and $1,500,000 for any number of claims arising out of a single occurrence. *Id.*, subd. 4.

Although municipalities, counties, and school boards often purchase liability insurance to cover tort claims, the state generally does not. Purchasing insurance waives the state's liability limits under the Tort Claims Act "to the extent that valid and collectible insurance . . . exceeds those limits and covers the claim." *Id.*, subd. 8.; *see also Pirkov-Middaugh v. Gillette Children's Hosp.*, 495 N.W.2d 608, 611 (Minn. 1993). The legislature has also eliminated joint and several liability for defendants found to be less than 50 percent at fault. Minn. Stat. § 604.02, subd. 1.

### 5. Indemnification

The Tort Claims Act sets forth the standard for when the state will defend, hold harmless, and indemnify a state employee against expenses, attorney's fees, judgments, fines, and amounts paid in settlement in connection with any tort, civil, or equitable claim or demand. *Id.* § 3.736, subd. 9. In summary, the standard requires that the officer or employee: (1) meets the definition of "employee of the state," which includes board members; (2) was acting within the scope of his

or her employment; and (3) provides complete disclosure and cooperation in the defense of the claim or demand. *Id.*

Acting within the scope of office or employment means that the employee was acting on the state's behalf in performing duties or tasks lawfully assigned by competent authority. *Id.*§ 3.732, subd. 1(3). The definition of "scope of office or employment," however, limits application of the statute to board members' acts that constitute the boards' lawful duties or tasks as set out in the boards' practice acts, chapter 214, the APA, and other statutes that give boards their authority.

The Tort Claims Act does not require the state to indemnify employees or officers in cases of malfeasance, willful or wanton actions, neglect of duty, nor for expenses, attorney's fees, judgments, fines, and amounts paid in settlement of claims for proceedings brought by or before responsibility or ethics boards or committees.

Except for elected officials, a state employee is presumed to have been acting within the scope of employment if the employee's appointing authority issues a certificate to that effect. This determination may be overturned by the Attorney General. The final determination, however, is a question of fact to be determined by the trier of fact, based on the circumstances of each case. *Id.* § 3.736, subd. 9; *Nelson v. Schlener*, 859 N.W.2d 288, 295 (Minn. 2015) (holding that district court serves as trier of fact when certification is disputed). Before denying certification, agencies should develop a strong factual record to support the decision. *See Nelson v. Schlener*, No. A13-0936, 2014 WL 502975, at *4 (Minn. Ct. App. Feb. 10, 2014) (holding that record lacked evidence of agency fact-gathering and factual development to support certification denial), *vacated on other grounds* 859 N.W.2d 288. If a state board is considering denying certification, the board should contact the assistant attorney general representing the board for advice on whether denying certification is appropriate and on what process to follow for making a certification decision.

The Attorney General is the attorney for all state boards. *Id.* § 8.06. The Attorney General's Office generally provides the legal defense in most claims against state officials.

Exceptions would be those claims not covered by the Tort Claims Act, such as claims for willful and wanton acts or malfeasance. Additionally, the Attorney General has broad discretionary powers to represent the interests of the state and state officials. *See Slezak*, 110 N.W.2d at 5. The Attorney General has discretion to decide whether to represent state officials or employees.

If a party brings an action under the Tort Claims Act against a state employee and obtains a judgment, the party is barred from bringing any action against that employee for the same conduct in any other proceeding. Minn. Stat. § 3.736, subd. 10.

### C. Violations of Federally Protected Rights (Section 1983 Actions)

A federal statute, 42 U.S.C. § 1983, creates a right to sue for deprivation of rights protected by the U.S. Constitution or by federal statutes. Section 1983 establishes no substantive rights but merely creates the right to sue for a violation of rights established elsewhere. The statute permits claims against persons who act "under color of any statute, ordinance, regulation, custom, or usage, of any State . . . ." Because board members act under color of state law, board members are potential defendants in section 1983 actions.

#### 1. Defense, indemnification, and scope of liability

The state has applied the indemnification and defense provisions of the Tort Claims Act to section 1983 actions. Accordingly, for the state to defend and indemnify, the act complained of must have been within the course of the defendant's employment. Further, as in an action based on a tort claim, the law is unclear as to whether the state indemnifies defendants in section 1983 actions for punitive damages. Accordingly, a board member sued for punitive damages should get legal advice about defense and indemnification. Unlike tort claims, there is no cap on money damages in a section 1983 lawsuit because the liability limits in the Tort Claims Act are preempted by federal law. In addition, pursuant to 42 U.S.C. § 1988, a prevailing plaintiff in a section 1983 action is entitled to reimbursement of reasonable costs and attorney's fees. An attorney's fees award is also not subject to the liability limits of the Tort Claims Act.

### 2. Board member immunity

Both judicial and legislative immunity are available defenses to a section 1983 suit. A disciplinary proceeding is a quasi-judicial process. Quasi-judicial immunity applies to those who exercise quasi-judicial authority and to persons integral to the judicial process who must perform their functions without the chilling effect of potential lawsuits. Actions that are legislative in nature, such as rulemaking, are considered quasi-legislative. When state employees are performing quasi-judicial or quasi-legislative functions they are entitled to absolute immunity.

Qualified immunity is a more limited kind of immunity granted for administrative and investigative acts. Qualified immunity is available in a section 1983 action if the state official did not violate any clearly established statutory or constitutional right. *Johnson v. Morris*, 453 N.W.2d 31, 38-39 (Minn. 1990).

The question of law in section 1983 suits against board members is whether they are analogous to judges and thus possess absolute immunity. If board members are viewed as analogous to administrators or investigators, they will only have qualified immunity. The difference between these two types of immunities is that absolute immunity defeats a lawsuit at the outset without the necessity of arguing the substance of the claims. Qualified immunity, on the other hand, does not avoid a review of the merits of a particular claim, but may ultimately be a defense to the imposition of liability on an official.

Even if a board member is entitled to absolute immunity, that immunity extends only to damages. A party who believes that a federally protected right is being, or is about to be, violated may sue for prospective injunctive relief. An example of such relief would be a lawsuit in which the plaintiff asks that the court declare a rule of the board invalid because it violates the U.S. Constitution.

When a plaintiff prevails in a section 1983 suit for prospective declaratory relief, judicial immunity does not bar an award of attorney's fees under 42 U.S.C. § 1988 against a judicial

officer. *Pulliam v. Allen*, 466 U.S. 522 (1984).[7] Therefore, if a plaintiff obtains injunctive or declaratory relief against a board or a board member, the board or board member could be liable for an award of costs and reasonable attorney's fees. State law, however, provides for indemnification of a board member or employee from any personal liability for the award for any act within the scope of the board member or employee's duties. Minn. Stat. § 3.736, subd. 9.

#### 3. Insurance against Section 1983 liability

Some local government entities, such as municipalities, counties, and school boards, purchase special insurance policies to cover liability for section 1983 actions. The state, however, has remained either uninsured or self-insured. The Department of Administration, Risk Management Division, is a resource for state boards to contact about insurance questions. The Risk Management Division can make recommendations to a state board about appropriate insurance coverage based on the board's specific needs and obtain insurance quotes for a board before insurance is purchased.

### D. Antitrust Actions

Antitrust actions against state boards generally arise in one of two ways. First, a government enforcement agency (U.S. Department of Justice, Federal Trade Commission (FTC), or state Attorney General) may bring a claim against a board if the statutes or rules under which the board acts, including the manner in which the board is enforcing them, have an anticompetitive effect. Second, an individual who alleges to be injured by board conduct may bring an action against the board claiming that a statute or rule as applied to him or her violates state or federal antitrust laws.

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[7] In 1996 Congress purported to legislatively reverse the *Pulliam* decision by enacting the Federal Courts Improvement Act of 1996 ("FCIA"), Pub. L. No. 104-317. Section 309 of the FCIA appears to bar awards of costs or attorney's fees against judges in cases based on their judicial acts. It also appears to bar actions for injunctive relief against a judicial officer. Courts are split as to whether section 309 of the FCIA also applies to quasi-judicial acts.

State entities can often assert a defense against antitrust lawsuits under what is known as the "state action immunity doctrine," but specific conditions must be satisfied for certain types of boards to rely on the doctrine. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015). One area in which state action immunity is in doubt is when a "controlling number of decisionmakers" on the board are "active market participants." *Id.* at 1114. In these circumstances, board members can still receive state action immunity if the state has articulated a clear policy to allow the challenged conduct and it is subject to active supervision by the state. *Id.* at 1112. This supervision must provide a "realistic assurance" that the challenged conduct "promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. 94, 101 (1988). Further, the supervisor must review the substance (and not merely the procedure) of the decision, must have the power to modify or veto the decision, and must not be an active market participant. *N.C. Dental*, 135 S. Ct. at 1116–17.

One court in another state denied state action immunity after determining that, despite judicial review of a board's disciplinary decisions, the board was not subject to active supervision because the scope of the judicial review was limited and did not enable the courts to review the board's decisions for consistency with state policy. *Teladoc, Inc. v. Tex. Med. Bd.* , No. 1-15-CV-343 RP, 2015 WL 8773509, at *9 (W.D. Tex. Dec. 14, 2015). Additionally, the FTC found that a board in another state was not subject to active supervision, even when it submitted a proposed rule to the commissioner of an agency, the legislature, and the governor. Although all had authority to overrule the decision, the FTC noted the lack of evidence of the actual level of review that the rule was subject to. *La. Real Estate Appraisers Bd. v. FTC*, No. 9374 (FTC Apr. 10, 2018).

### E. Defamation

#### 1. Elements of a defamation claim

For a statement to be considered defamatory "it must be communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff's reputation and to lower

him in the estimation of the community." *Stuempges v. Parke Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980); Restatement (Second) of Torts §§ 558-59.

**2. Defenses to a defamation claim**

The two defenses to a defamation claim are truth and privilege. Truth is an absolute defense to a defamation claim. A defense based on privilege may apply when a state board is the defendant in a defamation action. If an absolute privilege applies, immunity is given even for intentionally false statements made with malice. *Matthis v. Kennedy*, 67 N.W.2d 413, 416 (Minn. 1954).

**3. Immunities**

Not all immunities apply to defamation claims. Courts have held that good-faith immunity applies to defamation claims against the state and its employees, but discretionary immunity and official do not apply to defamation claims against public officials. *See Bauer v. State*, 511 N.W.2d 447, 448 (Minn. 1994) (addressing official immunity); *Johnson v. Dirkswager*, 315 N.W.2d 215, 223 (Minn. 1982) (addressing good-faith immunity); *Bird v. Dep't of Pub. Safety*, 375 N.W.2d 36, 41 (Minn. Ct. App. 1985) (addressing discretionary immunity).

**4. Opinions**

Not all opinions are protected under the First Amendment. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-21 (1990). The First Amendment protects from defamation claims only statements about matters of public concern that are not capable of being proven true or false and statements that cannot be reasonably interpreted as stating facts. *Id.*; *see also Geraci v. Eckankar*, 526 N.W.2d 391, 397 (Minn. Ct. App. 1995).

**5. Qualified privilege**

Qualified privilege protects the state and its employees from liability for allegedly defamatory statements on matters related to their duties as public officials. *See Bird*, 375 N.W.2d at 41. Qualified privilege also exists for all defendants if the allegedly defamatory statement was

made on a proper occasion, for a proper purpose, and on reasonable grounds for believing the truth of the statement. *Stuempges*, 297 N.W.2d at 256-57.

### 6. Absolute privileges

In certain contexts, statements by boards or their members carry an absolute privilege and form the basis for defamation. These contexts typically include publications required by law, statements made in judicial and quasi-judicial proceedings, and statements made in legislative proceedings.

#### a. *Publications required by law*

Public officials and public bodies, such as state boards, have an absolute privilege to publish defamatory matter when required by law to do so. Restatement (Second) of Torts § 592A. Because some boards' governing statutes require publication of all disciplinary measures taken by the board, those boards and their members have an absolute privilege against a defamation claim based on the contents of the published disciplinary action. *See, e.g.*, Minn. Stat. § 147.02, subd. 6; *LeBaron v. Minn. Bd. of Pub. Def.*, 499 N.W.2d 39 (Minn. Ct. App. 1993) (holding that statements in district public defender's letter to Board of Public Defense regarding reason for employee's termination were absolutely privileged because law required report regarding standards of competency of public defenders). In addition, state law classifies a licensing board's final disciplinary action as public data, thereby requiring a board to disclose its final decision as public data. Minn. Stat. § 13.41, subd. 5. The absolute privilege extends to a board and its members for disclosing public data.

#### b. *Judicial and quasi-judicial proceedings*

There is an absolute privilege for communications made in a judicial or quasi-judicial proceeding. *See Matthis*, 67 N.W.2d at 417. For example, in *Freier v. Independent School District No. 197*, 356 N.W.2d 724 (Minn. Ct. App. 1984), a school board and its members were not liable for defaming a teacher when they published a termination decision that was later reversed on appeal. The court reasoned that teacher-discharge proceedings were quasi-judicial

proceedings and communications incidental to judicial proceedings are absolutely privileged, whether or not they are defamatory. *Freier*, 356 N.W.2d at 728-29. From this case it appears to follow that a state board would not be held liable for defamation for disclosing the results of a disciplinary action. As discussed earlier, however, the MGDPA or a board's practice act may prohibit disclosure of certain information.

#### c. *Legislative proceedings*

The speech-and-debate clause of the Minnesota Constitution provides an absolute privilege for all statements made during the course of legislative proceedings. Minn. Const. art. IV, § 10; *Carradine v. State*, 511 N.W.2d 733, 734-35 (Minn. 1994).

# IX. CONTRACTING

Although most state contracting laws are contained in chapter 16C of the Minnesota Statutes, numerous other statutorily required contract clauses are scattered throughout the statutes. Every state agency must contract in accordance with the state procurement statutes. Minn. Stat. §§ 16C.001, .05, subd. 1. For purposes of chapter 16C, an agency means any state officer, employee, board, commission, authority, department, entity, or organization of the executive branch of state government. *Id.* § 16C.02, subd. 2. While a few specific state organizations such as public corporations are exempt from the requirements of chapter 16C, most state boards are subject to the requirements.

## A. Who is Responsible for What

State law divides the responsibility for contracting for services primarily with the agency head requesting the contract and the Commissioner of Administration. *Id.* §§ 16C.03, subd. 16, 16C.05, subd. 1.

### 1. Agency head

Unless altered by statute, the agency head is responsible for:

1. Identifying the need and specifications for a contract and determining who the contractor will be;

2. Drafting the contract;

3. Encumbering the funds in the Statewide Integrated Financial Tools (SWIFT) before the contract can be valid. *Id.* §§ 16C.05, subd. 2(a)(3), 16C.08, subd. 2(4); and

4. Ensuring that the terms and conditions of the contract and state law are met, that all funds expended under the contract are expended in accordance with the contract and state law, and that the results of the contract (the product delivered or the service provided) meet all the requirements of the contract.

If the contract is for professional or technical services valued in excess of $25,000, the agency head must provide information and certify to the Commissioner of Administration that a specific set of circumstances exist or have been met before the contract will be valid. *Id.* § 16C.08, subd. 3. These certifications are listed below in section B.1.

### 2. Commissioner of Administration

The Commissioner of Administration approves or disapproves a state agency's decision to contract for goods or services and its selection of a contractor. *Id.* §§ 15.061, 16C.05, subd. 2(a)(2), 16C.08, subd. 3. The Department of Administration must sign all certifications for contracts valued at more than $25,000 for professional and technical services (calculated over the entire life of the contract, including any potential extensions). *Id.* § 16C.08, subd. 3.

## B. Types of Contracts

Different requirements may apply depending on the type of contract the board is entering. The following addresses the common types of contracts and their associated requirements.

### 1. Contracts for professional or technical services

"Professional or technical services" means services that are intellectual in character, including consulting, analyzing, evaluating, predicting, planning, programming, or recommending, and the services result in producing a report or completing a task. Professional or technical contracts do not include providing supplies or materials, except by the approval of the Commissioner of Administration or except as incidental to the provision of professional or technical services. *Id.*, subd. 1.

For all professional or technical services contracts in excess of $25,000, the agency must provide the solicitation documentation along with the following for review and approval by the Commissioner:

1. a certification that all provisions of subdivision 2 and section 16C.16 have been verified or complied with;

2. a description demonstrating that the work to be performed under the contract is necessary to the agency's achievement of its statutory responsibilities and there is statutory authority to enter into the contract;

3. a description of the agency's plan to notify firms or individuals who may be available to perform the services sought in the solicitation;

4. a description of the performance measures or other tools that will be used to monitor and evaluate contractor performance; and

5. a description of the procurement method to be used in addressing accessibility standards for technology services.

All contracts for professional or technical services must include two statutorily required provisions, which are described below:

1. The contract must permit the Commissioner of Administration to unilaterally terminate the contract before completion with or without cause, upon payment of just compensation. The statute does not specify the length of notice required to invoke the cancellation clause and does not prohibit the agency or board from also having similar power to unilaterally terminate the contract before completion. The agency or board has discretion to allow the contractor to terminate the contract before completing the contract.

2. The contract must provide that 10% of the amount due under the contract be retained by the state agency or board until it certifies to the Commissioner of Administration that the contractor satisfactorily fulfilled the contract's terms, unless specifically excluded in writing by the Commissioner of Administration.[8]

For professional or technical services contracts valued in excess of $5,000, a competitive proposal process must be used to procure the services unless a statutory exemption exists. *Id.* § 16C.10, subd. 6. For professional or technical services contracts valued between $5,000 and $25,000, no advertised solicitation is required, and the agency can use a solicitation form referred to as a "quick call" that is sent to at least three vendors. *Id.* §§ 16C.06, subd. 1, .10, subd. 6. The state agency should determine the scope of work and deliverables that will be used to create the quick call for proposals and send the request to at least three vendors. When the agency is satisfied with the negotiated contract language with the vendor, the contractor and the agency head or a designee sign the agreement and send it to the Department of Administration for external review.

For professional or technical services contracts valued at more than $25,000, the agency must complete a contract-certification form and obtain the Commissioner of Administration's approval before sending out a request for proposals, either informal ($25,000-$50,000) or formal

[8] The 10% retainage requirement does not apply to contracts for professional services as defined in Minn. Stat. §§ 326.02-.15, regarding the regulation of architects, engineers, surveyors, landscape architects, geoscientists, and interior designers. Minn. Stat. § 16C.08, subd. 2(10).

(more than $50,000). *Id.* § 16C.06, subd. 2. Informal requests for proposals for technical professional services from $25,000 to $50,000 may be published in the State Register or posted on the Department of Administration's Office of State Procurement webpage. *Id.*§ 16C.06, subd. 1.

In addition to including the two required contract terms discussed above regarding early termination and retaining 10% of the contract value until certification of completion, agencies entering a contract for professional or technical services must comply with the following obligations:

1. No contract shall be entered into if a current state agency employee is able and available to perform the services called for by the contract;

2. Unless otherwise authorized by law, a competitive proposal process shall be used to acquire professional or technical services. A competitive bidding process shall not be utilized to acquire professional or technical services;

3. Agencies shall assign specific agency personnel to manage each contract;

4. The agency will not allow a contractor to begin work before the contract is fully executed unless an exception under Minn. Stat. § 16C.05, subd. 2a, has been granted by the Commissioner of Administration and funds are fully encumbered;

5. The contract shall not establish an employment relationship between the state or the agency and any persons performing under the contract;

6. If the results of the contract work will be carried out or continued by state employees after completing the contract, the contractor is required to include state employees in development and training, to the extent necessary to ensure that state employees can perform any ongoing work;

7. The agency cannot contract out its previously eliminated jobs for four years without first considering the same former employees who are on the seniority unit layoff list who meet the minimum qualifications determined by the agency; and

8. The contractor and agents cannot be state employees.

Minn. Stat. § 16C.08, subd. 2(1)-(8).

### 2. Contracts for goods or non-professional or technical services contracts

The Office of State Procurement (formerly known as the Materials Management Division) of the Department of Administration offers procurement training programs during the year to state personnel. The training covers purchasing policies and procedures. If you are interested in any of the classes, please go to the Office of State Procurement's website at *mmd.admin.state.mn.us/*.

### 3. Grants or loans

Grants and loans are a class of contracts that provide funding to an outside entity to provide services or support to a third party who is not employed by the state. State agencies do not have general or automatic grant- or loan-making authority. The authority for grants and loans must be specifically stated in the statutes and is generally directly related to the appropriations that fund them. The Office of Grants Management, a division of the Department of Administration, provides guidance to state agencies and boards regarding the administration and management of state grants. The Office of Grants Management's website is *mn.gov/admin/government/grants*.

### 4. Interagency agreements and joint powers agreements

Agreements with other governmental units are contracts. They may be for services, grants, or loans, but they should be treated like contracts. State agencies' authority to enter agreements with other state agencies is, in most cases, not clearly defined. Most state agencies do not have specific authority. Instead, their authority is defined in the Joint Powers Act, which gives governmental units broad authority to enter into agreements with each other. Minn. Stat. § 471.59. "Governmental unit" is defined as "every city, county, town, school district, independent nonprofit firefighting corporation, other political subdivision of this or another state, another state, federally recognized Indian tribe, the University of Minnesota, the Minnesota Historical Society, nonprofit hospitals licensed under sections 144.50 to 148.56, rehabilitation facilities and extended employment providers that are certified by the commissioner of employment and economic development, day and supported unemployment services licensed

under chapter 245D, and any agency of the state of Minnesota or the United States, and includes any instrumentality of a governmental unit." *Id.* Interagency agreements are between two or more state agencies, while joint powers agreements are between two or more governmental units. Under the Joint Powers Act, the governing body of any governmental unit may enter agreements with any other governmental unit to perform on behalf of that unit any service or function that the governmental unit providing the service or function is authorized to provide for itself. A governmental unit participating in a joint enterprise or cooperative activity with another governmental unit will not be liable for the acts or omissions of the other governmental unit unless it has agreed in writing to be responsible for them. *Id.* § 471.59, subd. 1a.

### C. Basic Elements of a State Contract

State agencies are encouraged to use state-approved contract forms when possible. The forms contain required statutory language and other contract terms that are generally in the state's best interests. The Department of Administration's *Professional/Technical Services Contracts Manual* is a helpful resource. Additionally, sample contract forms are available on the Department of Administration's website at *mmd.admin.state.mn.us/mn05000.htm*. Because these forms are generic, additional clauses may be necessary in some situations. The Department's manual is helpful for identifying these special situations. Some specific contracting considerations follow.

#### 1. Authority

The state agency must have statutory authority to enter a particular contract. The contractor is presumed to have authority to enter the contract unless it is another public agency.

#### 2. Solicitation process

The requirements governing competitive solicitation for various types of state contracts are principally found in chapter 16C of the Minnesota Statutes. Agencies may purchase goods, services, or construction up to $25,000 directly from a small business, small target group, or a veteran-owned business without going through a competitive solicitation process. *Id.* § 16C.16,

subds. 6(b), 6a(b). Refer to the Department of Administration's publication *Professional/Technical Services Contract Manual* for further assistance on requirements for advertising, consideration, and award.

### 3. Encumbering funds

The state cannot agree to an expense unless money sufficient to cover the expense has been encumbered. *Id.* § 16C.05, subd. 2(3). "Encumbered" means that the source of the funds to pay the expense has been identified and that the funds have been committed and will be available when the payment is due. *Id.* § 16A.011, subd. 11. Generally, this also means that the state cannot agree to indemnify the contractor or to pay expenses such as reasonable court costs, attorney's fees, penalties, or damages for economic harm caused to contractor. *See* Minn. Const. art. XI, § 1.

### 4. Non-appropriations clause

Contracts that extend beyond the appropriations period should contain language addressing the possibility of non-appropriations. The following statement is recommended: "Continuation of this agreement beyond June 30 of any year is contingent upon continued legislative appropriation of funds for the purpose of this agreement. If these funds are not appropriated, the State will immediately notify Contractor in writing and the agreement will terminate on June 30 of that year. The State shall not be assessed any penalty if the agreement is terminated because of the decision of the legislature not to appropriate funds." An agency may only agree to pay a penalty under specified circumstances if the agency first encumbers the money to pay the potential penalty.

### 5. Advance payment

A state agency generally cannot obligate the state to pay in advance for goods or services. Minn. Stat. § 16A.41, subd. 1. The only advance payments that can be made are for software or software maintenance services for state-owned or leased computer equipment, for information technology hosting services, for sole-source maintenance agreements when it is not cost-

effective to pay in arrears, for registration fees when advance payment is required or an advance-payment discount is provided, for exhibit booth space or boat slip rental when required to guarantee space availability, for subscription fees like newspapers and magazines, and for other costs that are either customarily paid in advance or for which an advance-payment discount is provided. *Id.* § 16A.065. Prepayments can also be made to the Library of Congress and the Federal Supervisor of Documents. *Id.*

**6. Audit clause**

All state contracts must include the state audit clause that allows the contracting agency, the legislative auditor, or the state auditor to examine the contracting party's relevant books, records, documents, and accounting procedures for at least six years. *Id.* § 16C.05, subd. 5. The only exception is when the state is selling, leasing, or licensing its own software or data to a purchaser.

**7. Minnesota Government Data Practices Act**

When a government entity contracts with private persons to perform any of the entity's functions, the contract must include terms that make clear that data created, collected, received, stored, used, maintained, or disseminated by the private persons in performing those functions is subject to the requirements in the MGDPA and that the private persons must comply with those requirements as if they were a government entity. *Id.* § 13.05, subd. 11. All contracts entered by a government entity must include notice that these requirements apply to the contract, but failing to include the notice in the contract does not invalidate the application of these requirements.

A board cannot agree to keep the contractor's data confidential except in accordance with the MGDPA. *See id.* ch. 13.

**8. Term**

For goods, general services, and building construction, the original contract cannot exceed two years unless the Commissioner of Administration determines that a longer duration is in the state's best interests. *Id.* § 16C.06, subd. 3b(a). The contract and any amendments to it

cannot have a combined term longer than five years without the Commissioner's specific approval unless otherwise provided by law. *Id.* For professional or technical services, the combined contract and amendments must not exceed five years, unless provided by law. *Id.*, subd. 3b(b). The term of the original contract must not exceed two years, unless the Commissioner determines that a longer duration is in the state's best interest. *Id.* The term of a contract may be extended beyond the time specified in Minn. Stat. ch. 16C, up to a total term of ten years, if the Commissioner of Administration, in consultation with the Commissioner of Minnesota Management Budget, determines that the contractor will incur upfront costs under the contract that cannot be recovered within a two-year period and that will provide cost savings to the state and that these costs will be amortized over the life of the contract. *Id.*, subd. 3b(c).

**9. Intellectual property rights**

If a contract is for services that will produce intellectual property, the contract should contain language protecting the intellectual property rights. Before executing a contract or license agreement involving intellectual property developed or acquired by the state, a state agency shall seek comment from the Attorney General on the terms and conditions of the contract or agreement. *Id.* § 16C.05, subd. 2(f).

**10. Affirmative action**

For all contracts for goods and services exceeding $100,000, the contractor may need a certificate of compliance with Minnesota human-rights laws or to certify its compliance with federal affirmative-action laws. An agency cannot accept a bid or proposal in excess of $100,000 if the contractor has more than 40 employees in Minnesota and the Commissioner of Human Rights has not received the contractor's business affirmative-action plan. *See id.* § 363A.36, subd. 1. For contracts for goods and services over $500,000, the contractor may need an equal-pay certificate. *Id.* § 363A.44, subd. 1.

### 11. Prohibitions on contracts with vendors who discriminate against Israel.

For contracts valued in excess of $50,000, a state agency cannot contract with a vendor that discriminates against Israel or against people or entities during business with Israel when the vendor makes operational decisions. *Id.* § 16C.053. "Discriminate" in this context is defined to include refusing to deal, terminating business activities, or engaging in other actions intended to limit commercial relations with Israel when the action is taken to discriminate based on nationality or national origin rather than a valid business reason. *Id.*, subd. 1(b). The contract should include the vendor's certification that it does not and does not plan to discriminate in this manner.

### 12. E-Verify

A contract for services valued in excess of $50,000 must require certification from the vendor and any subcontractors that, as of the date services will be performed on the state's behalf, the vendor and all subcontractors have either implemented or are in the process or implementing the federal E-Verify program for new employees who will perform work on behalf of the state. *Id.* § 16C.075. This requirement does not apply to contracts entered by the State Board of Investment or to contracts entered by the Office of Higher Education related to credit-reporting services if the office certifies that it cannot otherwise reasonably obtain the services. *Id.*

### 13. Execution

The state has developed the following routing procedure for examining and executing contracts: (1) the other party (e.g., contractor, consultant); (2) the state agency entering into, and encumbering funds for, the contract; and (3) the Department of Administration (excluding grants or interagency agreements). *Id.* § 16C.05, subd. 2(b).

If a subordinate member or agency employee signs the contract, he or she must be lawfully delegated the authority to do so. *See id.* §§ 15.06, subd. 6, 16C.05, subds. 1, 2(a)(1). The

Secretary of State maintains a complete list of state personnel legally authorized to enter certain agreements for their respective state agencies.[9] For contractors that are corporations, at least one corporate officer must sign the contract, but two corporate-officer signatures are preferable. If persons other than corporate officers have signed, the agency must obtain a corporate board resolution authorizing the subject signatures.

#### 14. Amendments

An amendment to a prior agreement must be in writing and it must clearly reference the prior agreement. The amendment is subject to the same signature process as the original contract.

### D. Other Minnesota Government Data Practices Act Considerations

A private person who obtains government data under a contract with the government agency is subject to liability for violating the MDGPA. Minn. Stat. § 13.05, subd. 11(a). But, except as required by the terms of a contract, private persons do not have a duty to provide public access to public data that are available from the government entity. *Id.*, subd. 11(b). Similarly, when a contract requires that data on individuals be made available to the contracting parties by the government entity, that data shall be administered consistent with the MGDPA. *Id.* § 13.05, subd. 6.

The classification of data that a board receives from business for bids or in response to requests for proposals is governed by Minn. Stat. § 13.591, subd. 3. Data classifications may change at various points during the procurement process.

[9] Certain boards' contracts must be approved by a majority of the board's members and executed by the board's chair and executive director. *E.g.*, Minn. Stat. § 3.922, subd. 5 (Indian Affairs Council); Minn. Stat. § 15.0145, subd. 4(d) (Minnesota Council on Latino Affairs, Council for Minnesotans of African Heritage, and Council on Asian-Pacific Minnesotans).

## X. COMPENSATION OF BOARD MEMBERS AND ADVISORY COUNCILS AND COMMITTEES

In general, board members and members of advisory councils and committees are compensated by a per diem rate set at $55 for each day spent on board activities, when authorized by the board, plus expenses in the manner and amount as authorized by the Commissioner's Plan, which is a plan developed by the Commissioner of Minnesota Management and Budget and approved by the Legislative Coordinating Commission. Minn. Stat. §§ 15.0575, subd. 3, 15.059, subd. 3. Members of health-related licensing boards may be compensated at the rate of $75 per day spent on board activities. *Id.* § 214.09, subd. 3. Some laws authorizing memberships in groups like these do not allow per diem payments. *See, e.g.*, Minn. Stat. § 97A.055, subd. 4b (providing that members of Department of Natural Resources citizen-oversight committee do not receive per diem).

Expenses and per diems can be paid only when authorized by a board. The board may, however, authorize per diems and expenses in various ways so that the work can be accomplished without having to authorize every single request for a per diem or expense. For example, a board may delegate to its executive director or president the authority to approve per diems for board members engaged in disciplinary work or rulemaking. Such a delegation may include establishing a minimum number of hours that must be accumulated before a per diem can be claimed. The executive director or president may also be authorized to set the maximum number of per diems that can be claimed for a single project, such as the review of a contested-case record before a hearing before the board.

In general, a board member who is also an employee of the state or a political subdivision of the state may not be compensated by both the board and the employer for time spent on board activities. The statutes discussed below are intended to prevent "double dipping." The statutes are clear, however, that a state or political-subdivision employee shall suffer no loss in compensation or benefits as a result of board service and shall receive expenses unless the

expenses are reimbursed from another source. Generally, childcare expenses may be reimbursed only for time spent on board activities that are outside normal working hours.

A state or political-subdivision employee who is also a member of an administrative board, agency, committee, council, or commission governed by Minn. Stat. §§ 15.0575, 15.059, or 214.09, may not receive the daily payment for activities that occur during working hours for which the person is compensated by the state or political subdivision. A state or political-subdivision employee may, however, receive a daily payment if the employee uses vacation time for board, agency, committee, council, or commission activities. Each board must adopt internal standards prescribing what constitutes a day spent on official activities for purposes of paying per diem. Those standards may be incorporated in a delegation of authority to the executive director or president to approve daily payments.

It is important that state and political-subdivision employees understand the specific statute that applies to their board, council, or commission when determining whether they are entitled to receive a per diem. It is not always clear whether someone is a full-time state employee or an employee of a political subdivision. For example, it is sometimes difficult to categorize elected officials. There have been no reported cases under the three statutes as to whether a difference exists between state or political-subdivision employees and officers, but a difference between public officials and employees has been recognized in other contexts. A public officer or official is distinguished from a public employee in the greater "importance, dignity and independence" of the official's position. *Tillquist v. Dep't of Labor & Indus.*, 12 N.W.2d 512, 514 (Minn. 1943); *see also Cahill v. Beltrami Cty.*, 29 N.W.2d 444, 446-48 (Minn. 1947) (holding that because sheriff was officer of court, his salary could be established by district court rather than county board). Certain statutes refer to both employees and to officers or public officials. *See, e.g.*, Minn. Stat. § 15.054. But if an elected official is paid about the equivalent amount of money as a full-time salary for some employee positions, it could be argued that the spirit of the law would preclude any other payment or per diem to the public official. *See, e.g.*, *Jerome v. Burns*, 279 N.W. 237, 240 (Minn. 1938) (holding that city clerk was

not entitled to additional compensation for services already performed in course of his official duties as city commissioner of registration). Anyone with questions regarding whether a member is a state or political subdivision employee should contact the assistant attorney general assigned to the board.

At times, an executive director must contact a board member with a question about a request for a per diem or expense reimbursement. When that happens, keep two things in mind. First, the executive director is in the uncomfortable position of asking his or her "boss" to explain himself or herself. Second, board-member compensation is thoroughly scrutinized by the legislative auditors. The executive director's questions protect the board and its members from embarrassment by clearing up these matters in advance of an audit.

MINNESOTA HOUSING

**Committee Agenda Item:** D.
**Date: 2/27/2020**

**Item:** Chief Risk Officer Report

**Staff Contact(s):**
Mike Thone, 651.296.9813, Mike.Thone@state.mn.us
Rachel Robinson, 651.297.3125, Rachel.Robinson@state.mn.us

**Request Type:**

☐ Approval
☐ Motion
☐ Resolution

☒ No Action Needed
☐ Discussion
☒ Information

**Summary of Request:**
Agency management has developed procedures for the receipt, retention and treatment of allegations of conflict of interest, misuse of funds, and fraud/embezzlement submitted to the Chief Risk Officer or other agency personnel by any person internal or external to the Agency.

This is a semi-annual update from the Chief Risk Officer regarding the status of conflict of interest, misuse of funds, and fraud/embezzlement investigations initiated as a result of allegations received by the Chief Risk Officer or other agency personnel. The last report was made August 29, 2019.

The next semi-annual report will be delivered August 2020, for the period covering January 1, 2020 – June 30, 2020.

**Fiscal Impact:**
None

**Meeting Agency Priorities:**
- ☐ Improve the Housing System
- ☐ Preserve and Create Housing Opportunities
- ☐ Make Homeownership More Accessible
- ☐ Support People Needing Services
- ☐ Strengthen Communities

**Attachment(s):**
Status of Conflict of Interest, Misuse of Funds, and Fraud/Embezzlement Investigations Opened by the Agency or Chief Risk Officer, for the Period July 15, 2019 – December 31, 2019.

Agenda Item: D
Background & Details

This update informs the Board about the number of conflict of interest, misuse of funds, and fraud/embezzlement investigations opened and resolved, and investigations still in-process for the identified period.

**Status of Conflict of Interest, Misuse of Funds, and Fraud/Embezzlement Investigations Opened by the Agency or Chief Risk Officer For the Period July 15, 2019 – December 31, 2019**

| Allegation Type | Investigations in-process as of July 15, 2019 | New Investigations Opened During the Period | Investigations Resolved During the Period | Comments Regarding Investigations |
|---|---|---|---|---|
| **Alleged Conflict of Interest (COI)** | 0 | 1 | 1 | 1) One allegation reported and investigated - determined no COI policy violations occurred<br>2) No investigations currently in-process |
| **Alleged Misuse of Funds (MOF) less than $50,000** | 0 | 1 | 1 | 1) Resolved by recapture of misused funds<br>2) No investigations currently in-process |
| **Alleged Misuse of Funds (MOF) greater than $50,000** | 0 | 0 | 0 | No allegations reported and no investigations currently in-process |
| **Alleged Fraud/Embezzlement** | 2 | 0 | 2 | 1) One investigation resolved with funds returned to the agency<br>2) One investigation resolved with revenue recapture filed with Minnesota Department of Revenue<br>3) No investigations currently in-process |
| **Summary** | **2** | **2** | **4** | |